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SUPREME COURT OF THE UNITED STATES.

No. 163.

HENRY O. CLARK, IRA JUSTIN, JR., AND A. HYATT SMITH, PLAINTIFFS IN ERROR,

v.

HENRY C. BOWEN, THEODORE McNAMEE, SAMUEL P. HOLMES, AND HENRY L. STONE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WISCONSIN.

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District Court of the United States of America for the District of Wisconsin.

United States of America, District of Wisconsin, *ss.*

At a stated term of the District Court of the United States of America, for the District of Wisconsin, begun and held, according to law, at the City of Milwaukie, on the first Monday of January, in the year of our Lord one thousand eight hundred and fifty-seven.

Present, the Honorable Andrew G. Miller, Judge of said Court, presiding; Stephen V. R. Ableman, Marshal; B. K. Miller, Clerk.

Among others were the following proceedings, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH.

Be it remembered, that heretofore, to wit: on the sixth day of August, in the year of our Lord one thousand eight hundred and fifty-six, the said Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, by Messrs. Finch & Lynde, their attorneys, filed their præcipe for a summons against the said Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, as follows:

Præcipe for Summons.

United States District Court for Wisconsin.

HENRY C. BOWEN. THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH.

To the clerk of the United States District Court. You will please issue a summons in the above-entitled cause, in a plea of trespass on the case upon promises, damages sixteen thousand dollars, returnable on the first Monday of September next.

Aug. 6th, 1856.

FINCH & LYNDE,
Plf. Att'ys.

Whereupon a summons issued as follows:

Summons.

The United States of America, District of Wisconsin, *ss.*

The President of the United States of America, to the Marshal of the District of Wisconsin, greeting:

You are hereby commanded to summon Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, to appear before the District Court of the United States of America, for the District of Wisconsin aforesaid, at Milwaukie, on the first Monday of September ensuing, then and there to answer unto Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, in a plea of trespass on the case on promises, to their damage, sixteen thousand dollars, which shall then and there be made to appear. And of this writ make due return. Witness, the Hon. Andrew G. Miller, Judge of the said District Court of the United States, at the City of Milwaukie, in the said district of Wisconsin, this sixth day of August, in the year of our Lord one thousand eight hundred and fifty-six, and of the Independence of the United States the eighty-first.

[SEAL.]

B. K. MILLER,
Clerk.

FINCH & LYNDE,
Attorneys.

And came the said marshal, on or before the return day of said writ, and returned said writ with his return of service indorsed thereon, as follows:

Marshal's Return.

"This writ, served personally on the within-named Henry O. Clark and A. Hyatt Smith, by showing each of them the original, and giving each of them a copy thereof, August 6th, 1856. S. V. R. Ableman, Marshal. By George Cogswell, Deputy. Served personally by showing the original, and delivering a copy of the within summons to the within-named Ira Justin, Jr., August 7 1856. S. V. R. Ableman, Marshal, per C. H. Windt, Deputy."

And afterwards, to wit, on the first day of September, A.D. 1856, came the said plaintiffs by their said attorneys, and filed their declaration as follows.

Declaration.

District of Wisconsin, *ss.*

Of the first Monday of September, A. D. 1856, Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, who are residents and citizens of the State of New York, and who, at the time of the making of the promises hereinafter stated, were co-partners in trade, doing business under the name, firm, and style of Bowen & McNamee, plaintiffs in this suit by Finch & Lynde, their attorneys, complain of Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, who, at the time of the making of the promises hereinafter stated, were co-partners, under the name, firm, and style of H. O. Clark & Co., and who are citizens and residents of the State of Wisconsin, defendants in this suit, of a plea of trespass on the case on promises.

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For that, whereas, the said defendants, on the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty-four, at New York, to wit, at said District of Wisconsin, made their certain promissory note in writing, bearing date the same day and year aforesaid, and thereby, for value received, promised to pay to the order of said plaintiffs, two months after date, at the Janesville City Bank, one thousand dollars, with current rate of exchange for draft on New York, and then and there delivered the said note to the said plaintiffs.

By reason whereof, and by force of the law in such case made and provided, the said defendants became liable to pay said plaintiffs the said sum of money mentioned in said note, according to the tenor and effect thereof; and being so liable, and in consideration thereof, the said defendants afterwards, to wit, on the same day and year aforesaid, at the place aforesaid, to wit, at said District of Wisconsin, undertook, and faithfully promised the said plaintiffs to pay them the said sum of money, mentioned in the said note, according to the tenor and effect thereof.

And whereas, also, the said defendants afterwards, to wit, on the second day of August, in the year of our Lord eighteen hundred and fifty-six, at the place aforesaid, were indebted to the said plaintiffs in the sum of sixteen thousand dollars, for divers goods, wares, and merchandise, by the said plaintiffs before that time sold and delivered to the said defendants, and at their instance and request; and also in the further sum of sixteen thousand dollars for the work and labor, care and diligence of the said plaintiffs, by them before that time done, performed, and bestowed in and about the business of the said defendants, and at their instance and request; and also in the further sum of sixteen thousand dollars, for money by the said plaintiffs before that time lent and advanced to the said defendants and at their like instance and request; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants, and at their like instance and request; and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and being so indebted, and in consideration thereof, the said defendants afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and faithfully promised the said plaintiffs, to pay them the said several sums of money last above mentioned, when they should be thereunto afterwards requested.

And whereas, the said defendants afterwards, to wit, on the day and year last aforesaid, at the District of Wisconsin aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due, and owing, and then in arrear and unpaid, and upon such accounting the said defendants were then and there found to be in arrear and indebted to the said plaintiffs in the further sum of sixteen

thousand dollars, like lawful money; and being so found in arrear and indebted, they, the said defendants, undertook and promised the said plaintiffs to pay them the last-mentioned sum of money, when they should be thereunto afterwards requested. Yet the said defendants have not paid to the said plaintiffs the whole or any part of the said several sums of money above mentioned, although often requested, &c., but to pay the same or any part thereof, to the said plaintiffs, the said defendants have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of sixteen thousand dollars, and therefore they bring suit, &c.

FINCH & LYNDE,
Attorneys for Plaintiff.

To the within-named Defendants.

Please take notice, that the following are copies of the Notes, upon which this suit is brought, and which the plaintiffs will give in evidence under the common counts within pleaded.

NEW YORK, April 27, 1854.

$1000.

Two months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & CO.

NEW YORK, April 27, 1854.

$1016 $\frac{20}{100}$.

Five months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, ten hundred and sixteen $\frac{20}{100}$ dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & CO.

NEW YORK, April 27, 1854.

$1000.

Eight months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & CO.

NEW YORK, April 27, 1854.

$1016 $\frac{20}{100}$.

Four months after date, for value received, we, the subscribers,

of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, ten hundred and sixteen $\frac{20}{100}$ dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & CO.

NEW YORK, April 27th, 1854.

$1000.

Seven months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, at the Janesville City Bank, with current rate of exchange for drafts upon New York.

H. O. CLARK & Co.

NEW YORK, April 27th, 1854.

$1000.

Six months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & Co.

NEW YORK, April 27th, 1854.

$1000.

Three months after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, with current rate of exchange for draft upon New York.

H. O. CLARK & Co.

NEW YORK, April 27th, 1854.

$1000.

One month after date, for value received, we, the subscribers, of Janesville, State of Wisconsin, promise to pay to the order of Bowen & McNamee, one thousand dollars, at the Janesville City Bank, with current rate of exchange for draft upon New York.

H. O. CLARK & Co.

Yours, &c.,

FINCH & LYNDE,

Plaintiffs' Attorneys.

Rule to Plead.

And same day (September 1st, 1856), being a rule day of said court, came the said plaintiffs by their said attorneys, and entered on the order and rule book, a rule on the defendants to plead, as follows:

U. S. District Court, District of Wisconsin.

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH.

First Monday of September, 1856.

On filing the declaration in the above-entitled cause, and on motion of Finch & Lynde, attorneys for plaintiffs, it is ordered, that the said defendants appear and plead, or demur to plaintiffs' declaration on file, on or before the first Monday of October next, or default, &c.

FINCH & LYNDE,
Plaintiffs' Attorneys.

Pleas, &c.

And afterwards, to wit, on the sixth day of October, A.D. 1856, came the said defendants, by their attorneys Messrs. Bennett, Sloan, and Patten, and filed their pleas and affidavits of merits, as follows:

District Court of the United States, for the District of Wisconsin.

HENRY O. CLARK, A. HYATT SMITH, and IRA JUSTIN, JR.,
v.
HENRY C. BOWEN et al.

And the said Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., defendants in this suit, by Bennett, Sloan, and Patten, their attorneys, come and defend the wrong and injury, when, &c., and say, that they did not undertake and promise, in manner and form, as the said plaintiffs have above thereof complained against them, and of this the said defendants put themselves upon the country. And the said plaintiffs, do the like, &c.

And the said defendants, for a further plea in this behalf, by leave of the court, for that purpose first had and obtained, say, that the said plaintiffs their action aforesaid against the said defendants ought not to have or maintain, because the said defendants say, that after the said supposed promises and undertakings of the said defendants, and before the commencement of the said action of the said plaintiffs against the said defendants in this behalf, to wit, on the third day of July, A.D. 1854, the said defendants paid to the said plaintiffs the several sums of money in the said plaintiffs' declaration mentioned; and this the said defendants are ready to verify. Wherefore, they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them.

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And for a further plea in this behalf, leave of the court being first had and obtained, the said defendants say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against them, the said defendants, because they say, that on the third day of July, A.D. 1854, in the Circuit Court, in the County of Rock, in the State of Wisconsin, in vacation, a judgment in favor of the said plaintiffs and against the said defendants, upon a plea of confession, signed by Charles S. Jordan, who was then and there an attorney of said Circuit Court for Rock County, for the sum of seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, was duly obtained and entered.

And the said defendants aver, that the said Charles S. Jordan had authority for confessing the said judgment, which authority was a certain written instrument, commonly called a warrant of attorney, and was distinct from that containing the evidence of the said plaintiffs' demand; a copy of which said warrant of attorney is hereto annexed, and marked, "A."

And the said defendants further aver, that the said warrant of attorney was produced to the clerk of the said Circuit Court, at the time of the entering of said judgment, and was filed with the said clerk at the time of filing and docketing such judgment to wit, on the third day of July, A.D. 1854, at the said clerk's office, in the city of Janesville, Rock County, Wisconsin.

And the said defendants further aver, that the said judgment was rendered for the identical promises and undertakings in the said plaintiffs' declaration in this suit mentioned, and for their costs by them in that behalf laid out and expended, as by the record and proceedings thereof, still remaining in said court, will more fully appear; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this they, the said defendants, are ready to verify; wherefore, they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them.

And for a further plea in this behalf, leave of the court being first had, the said defendants say that the said plaintiffs, their aforesaid action against them ought not to have and maintain, because they say that heretofore, to wit, on the third day of July, A.D. 1854, at the City of Janesville, Wisconsin, the said defendants, H. O. Clark and Ira Justin, Jr., two of the defendants in this cause, made, executed, and delivered to the said plaintiffs a certain instrument in writing, commonly called a warrant of attorney, a copy of which is hereto annexed and marked "A.," for the purpose of paying, satisfying, and discharging the said identical causes of action, promises, and undertakings, in the said plaintiffs' declaration mentioned, and for the purpose also of paying, satisfying, and discharging the notes, copies of which are appended to the said plaintiffs' declaration. And the said defendants further aver, that the said warrant of at-

torney was then and there received by the said plaintiffs, in payment, satisfaction, and discharge of the said identical causes of action, promises, and undertakings in the said plaintiffs' declaration mentioned; and in payment, satisfaction, and discharge of the said notes, copies of which are appended to the said plaintiffs' declaration. And this the said defendants are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have and maintain their aforesaid action thereof against them.

And for a further plea in this behalf, leave of the court being first had and obtained, the said defendants say, that the said plaintiffs, their aforesaid action against them ought not to have and maintain, because they say that heretofore, to wit, on the third day of July, A.D. 1854, in the Circuit Court for Rock County, in the State of Wisconsin, in vacation, a judgment in favor of the said plaintiffs and against the said defendants, Henry O. Clark and Ira Justin, Jr., two of the said defendants, upon a plea of confession, signed by Charles S. Jordan, who was then and there an attorney of the said Circuit Court for Rock County, for seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, was obtained and entered. And the said defendants aver, that the said Charles S. Jordan had authority for confessing said judgment, which authority was a certain instrument in writing, commonly called a warrant of attorney, and was distinct from that containing the evidence of the said plaintiffs' demand, a copy of which warrant of attorney is hereto annexed, marked "A." And the said defendants further aver, that the said warrant of attorney was produced to the clerk of the said Circuit Court at the time of entering such judgment, and was filed with the said clerk at the time of filing and docketing such judgment, to wit, on the third day of July, A.D. 1854, at the said clerk's office, in the City of Janesville, Rock County, Wisconsin; and the said defendants further aver, that the said judgment was rendered for the identical promises and undertakings and causes of action in the said plaintiffs' declaration in this suit mentioned, and for their costs by them in that behalf laid out and expended, as by the record and proceedings thereof still remaining in said court will more fully appear; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this they, the said defendants, are ready to verify. Wherefore, they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, the said defendants.

And the said defendants, for a further plea in this behalf, say, that the said plaintiffs, their action aforesaid against the said defendants ought not to have and maintain, because the defendants say, that after the making of the said promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit, on the third day of July, A.D. 1854, at the city of Janes-

ville, in Rock County, Wisconsin, a judgment by confession in favor of the said plaintiffs, and against the said defendants, for the sum of seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, was entered and rendered in the Circuit Court for Rock County, in the State of Wisconsin, for and upon the identical promises and undertakings mentioned in the said plaintiffs' declaration.

And the said defendants aver, that the said judgment was entered up and rendered by virtue of a certain instrument in writing, commonly called a warrant of attorney, a copy of which is hereto annexed and marked "A.;" which said warrant of attorney was produced to the clerk of said Circuit Court, at the time of entering said judgment, and was filed with the said clerk at the time of filing and docketing said judgment, to wit, on the third day of July, A.D. 1854, at his office, in the City of Janesville, in said Rock County. And the said defendants further aver, that the said judgment was given by the said defendants, and received and accepted by the said plaintiffs, in full satisfaction and discharge of the said promises and undertakings in the said plaintiffs' declaration mentioned, and of the damages sustained by the said plaintiffs, by reason of the non-performance of said promises and undertakings; and the said promises and undertakings were then and there fully cancelled by the said plaintiffs; and this the said defendants are ready to verify. Wherefore, they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against the said defendants.

Dated October 6th, 1856.

BENNETT, SLOAN & PATTEN,
Defendants' Attorneys.

I hereby certify, that in my opinion the second, third, fourth, and fifth and sixth pleas, above pleaded, are well founded.

Dated October 6th, 1856.

JOHN R. BENNETT,
Attorney and Counsellor at Law.

State of Wisconsin, Rock County, *ss.*

"A."

Know all men by these presents, that we, the subscribers, Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, doing business under the name of H. O. Clark & Co., are justly indebted unto Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, partners in trade, doing business in the City of New York, under the name, style, and firm of Bowen & McNamee, in the full and just sum of seven thousand nine hundred and fifty dollars and seventy-five cents, for goods, wares, and merchandise, sold and delivered by the partners aforesaid, firm of Bowen & McNamee, before

torney was then and there received by the said plaintiffs, in payment, satisfaction, and discharge of the said identical causes of action, promises, and undertakings in the said plaintiffs' declaration mentioned; and in payment, satisfaction, and discharge of the said notes, copies of which are appended to the said plaintiffs' declaration. And this the said defendants are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have and maintain their aforesaid action thereof against them.

And for a further plea in this behalf, leave of the court being first had and obtained, the said defendants say, that the said plaintiffs, their aforesaid action against them ought not to have and maintain, because they say that heretofore, to wit, on the third day of July, A.D. 1854, in the Circuit Court for Rock County, in the State of Wisconsin, in vacation, a judgment in favor of the said plaintiffs and against the said defendants, Henry O. Clark and Ira Justin, Jr., two of the said defendants, upon a plea of confession, signed by Charles S. Jordan, who was then and there an attorney of the said Circuit Court for Rock County, for seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, was obtained and entered. And the said defendants aver, that the said Charles S. Jordan had authority for confessing said judgment, which authority was a certain instrument in writing, commonly called a warrant of attorney, and was distinct from that containing the evidence of the said plaintiffs' demand, a copy of which warrant of attorney is hereto annexed, marked "A." And the said defendants further aver, that the said warrant of attorney was produced to the clerk of the said Circuit Court at the time of entering such judgment, and was filed with the said clerk at the time of filing and docketing such judgment, to wit, on the third day of July, A.D. 1854, at the said clerk's office, in the City of Janesville, Rock County, Wisconsin; and the said defendants further aver, that the said judgment was rendered for the identical promises and undertakings and causes of action in the said plaintiffs' declaration in this suit mentioned, and for their costs by them in that behalf laid out and expended, as by the record and proceedings thereof still remaining in said court will more fully appear; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this they, the said defendants, are ready to verify. Wherefore, they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, the said defendants.

And the said defendants, for a further plea in this behalf, say, that the said plaintiffs, their action aforesaid against the said defendants ought not to have and maintain, because the defendants say, that after the making of the said promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit, on the third day of July, A.D. 1854, at the city of Janes-

ville, in Rock County, Wisconsin, a judgment by confession in favor of the said plaintiffs, and against the said defendants, for the sum of seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, was entered and rendered in the Circuit Court for Rock County, in the State of Wisconsin, for and upon the identical promises and undertakings mentioned in the said plaintiffs' declaration.

And the said defendants aver, that the said judgment was entered up and rendered by virtue of a certain instrument in writing, commonly called a warrant of attorney, a copy of which is hereto annexed and marked "A.;" which said warrant of attorney was produced to the clerk of said Circuit Court, at the time of entering said judgment, and was filed with the said clerk at the time of filing and docketing said judgment, to wit, on the third day of July, A.D. 1854, at his office, in the City of Janesville, in said Rock County. And the said defendants further aver, that the said judgment was given by the said defendants, and received and accepted by the said plaintiffs, in full satisfaction and discharge of the said promises and undertakings in the said plaintiffs' declaration mentioned, and of the damages sustained by the said plaintiffs, by reason of the non-performance of said promises and undertakings; and the said promises and undertakings were then and there fully cancelled by the said plaintiffs; and this the said defendants are ready to verify. Wherefore, they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against the said defendants.

Dated October 6th, 1856.

BENNETT, SLOAN & PATTEN,
Defendants' Attorneys.

I hereby certify, that in my opinion the second, third, fourth, and fifth and sixth pleas, above pleaded, are well founded.

Dated October 6th, 1856.

JOHN R. BENNETT,
Attorney and Counsellor at Law.

State of Wisconsin, Rock County, *ss.*

"A."

Know all men by these presents, that we, the subscribers, Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, doing business under the name of H. O. Clark & Co., are justly indebted unto Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, partners in trade, doing business in the City of New York, under the name, style, and firm of Bowen & McNamee, in the full and just sum of seven thousand nine hundred and fifty dollars and seventy-five cents, for goods, wares, and merchandise, sold and delivered by the partners aforesaid, firm of Bowen & McNamee, before

this day, to us, the subscribers, at our previous request, at the said City of New York, to wit, at Janesville, in said county.

Now, therefore, in consideration of the promises, we do hereby make, constitute, and appoint Charles S. Jordan, Esq., to be our true and lawful attorney, irrevocable, for us, and in our name and stead, to enter our appearance before the Circuit Court for the County of Rock aforesaid, this day, or any day hereafter, to waive the service of process, and confess a judgment in favor of the said Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, upon the said indebtedness for the above sum, together with costs, and also to file a cognovit for the said amount, and to release all errors that may intervene in entering up said judgment, or in issuing the execution thereon; hereby ratifying and confirming all which our said attorney may do by virtue hereof.

Witness our hands and seals, at Janesville, in said county, the 3d day of July, A.D. 1854.

In presence of ——— H. O. CLARK, [SEAL.]
IRA JUSTIN, JR., [SEAL.]
A. HYATT SMITH, [SEAL.]
By H. O. CLARK, [SEAL.]
Partner.

Affidavit of Merits.

District Court of the United States, for the District of Wisconsin.

HENRY O. CLARK et al.
v.
HENRY C. BOWEN et al.

District of Wisconsin, Rock County, *ss.*

Henry O. Clark, one of the defendants in the above-entitled cause, being duly sworn, says, that the defendants in said cause have a good and substantial defence upon the merits to the whole of the demand of the said plaintiffs in this suit.

HENRY O. CLARK.

Sworn to before me, this 6th day of October, A.D. 1856.

L. F. PATTEN,
Notary Public, residing in Rock County, Wis.

At a special term of the District Court of the United States of America, for the District of Wisconsin, begun and held, according to law, at the City of Milwaukie, in said District of Wisconsin, on the second Monday (being the tenth day) of November, A.D. 1856, present, the honorable Andrew G. Miller, Judge of said Court, presiding.

On the first day of the said term, to wit, on the tenth day of November, A.D. 1856, the following proceedings were had, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
A. HYATT SMITH, HENRY O. CLARK, and IRA JUSTIN, JR.
} At Law.

Replication and Rule to Rejoin.

This day came the plaintiffs, by their attorneys, and filed their replication, and on their motion, it is ordered by the court, that the defendants rejoin thereto by the first Monday of December next.

Which said replication is as follows:

District Court of the United States, for the District of Wisconsin.

HENRY C. BOWEN et al.,
v.
HENRY O. CLARK, A. HYATT SMITH, and IRA JUSTIN, JR.

Rep. to 2d plea. And the said plaintiffs, by Wm. P. Lynde, their attorney, as to the said plea of the said defendants, by them secondly above pleaded, say, that they, the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof, against them, the said defendants, because they say, that the said defendants did not, on the third day of July, A. D. 1854, nor on any other day or time, pay to the said plaintiffs the said several sums of money, in the said plaintiffs' declaration mentioned, nor any nor either of them, nor any part of the same, in manner and form as the said defendants have above in their said second plea in that behalf alleged, and this they, the said plaintiffs, pray may be inquired of by the county, and the said defendants do the like, &c.

Rep. to 3d plea. And the said plaintiffs, by their said attorney, as to the said plea of the said defendants, by them thirdly above pleaded, say, that they, the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof, against them, the said defendants, because they say, that after the entering, filing, and docketing of the said supposed judgment, in the said third plea mentioned, and before the commencement of this suit, to wit, at a term of said Circuit Court, within and for said County of Rock, duly holden at the court-house, in the City of Janesville, in said county, on the fourth Monday of November, A.D. 1854, A. Hyatt Smith, one of the said defendants, appeared in said Circuit Court, and moved the said court, for reasons and causes by him then and there shown to said court, to vacate and set aside the said judgment, as to him, the said Smith, and all subsequent proceedings under said judg-

ment, and that such proceedings were then and there had; that afterwards, to wit, at the term and on the day and year last aforesaid, it was, by the said Circuit Court, ordered, that the said judgment, and all subsequent proceedings under the same, be set aside, as to the said Smith, as irregular and void, but without prejudice to the plaintiffs' rights, as against the property of the said defendants, Clark and Justin; and that afterwards, to wit, at a term of the said Circuit Court, holden at the same place, within and for said County of Rock, on the first Monday of June, A. D. 1855, to wit, on the sixth day of July, A. D. 1855, on motion of the plaintiffs, herein also plaintiffs and judgment creditors, in the said judgment, in said plea mentioned, and for reasons and causes shown by said plaintiffs, then and there, to said Circuit Court, the said Circuit Court did order, that the said judgment, as against the said defendants, Clark and Justin, be vacated, opened, and set aside, and held for nought; and the said judgment was then and there, by the said Circuit Court, vacated and set aside, as to the said Clark and the said Justin; and that said judgment is now as aforesaid, by the orders aforesaid, of said Circuit Court, absolutely set aside, annulled, and vacated, as appears by the record of said Circuit Court, which said orders of the said Circuit Court as aforesaid, vacating said judgment as aforesaid, remain in full force and unreversed, and this they, the said plaintiffs, are ready to verify; wherefore, they pray judgment, and their damages by them sustained on occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to be adjudged to them, &c.

Rep. to 4th plea. And the said plaintiffs, by their said attorney, to the said plea of the said defendants by them fourthly above pleaded, say, that they, the said plaintiffs, by reason of anything by the said defendants in their plea aforesaid alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendants, because, protesting that the said defendants, H. O. Clark and Ira Justin, Jr., did not make, execute, and deliver to them, the plaintiffs, a certain instrument in writing, commonly called a warrant of attorney, for the purpose of paying, satisfying, and discharging the said identical causes of action, promises, and undertakings in said declaration mentioned; and for the purpose of paying, satisfying, and discharging the notes, copies of which are appended to said declaration for replication in this behalf, the plaintiffs say, that *that* they did not receive or accept the said certain instrument in writing, commonly called a warrant of attorney, in payment, satisfaction, and discharge of the said identical causes of action, promises, and undertakings, in the said declaration mentioned, or in payment, satisfaction, and discharge of the said notes, copies of which are appended to the said declaration, or any or either of them, or of the damages sustained by them, the plaintiffs, by reason of the non-performance thereof, in manner and form as the said defendants have

by their said plea above alleged; and this, they, the said plaintiffs, pray may be inquired of by the country, and the said defendants do the like, &c.

Rep. to 5th plea. And the said plaintiffs, by their said attorney, as to the said plea of the said defendants, by them fifthly above pleaded, say, that they, the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants, because they say, that there was not, on the third day of July, A. D. 1854, nor on any other day, in the Circuit Court for Rock County, in the State of Wisconsin, in vacation or in term, any judgment in favor of the said plaintiffs, and against the said defendants, Henry O. Clark and Ira Justin, Jr., two of the said defendants, upon any plea of confession, or otherwise, for seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, or for any other sum or sums obtained, or entered for or upon the identical promises, and undertakings, and causes of action, or either of them in the said plaintiffs' declaration mentioned; and this they, the said plaintiffs, pray may be inquired of by the country, and the said defendants do the like, &c.

Rep. to 6th plea. And the said plaintiffs, by their said attorney, as to the said plea of the said defendants by them sixthly above pleaded, say, that they, the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants, because they say, that there was not, on the third day of July, A. D. 1854, nor on any other day or time, at the City of Janesville, Rock County, Wisconsin, or elsewhere, a judgment, by confession or otherwise, in favor of the said plaintiffs and against the said defendants, for the sum of seven thousand nine hundred and fifty dollars and seventy-five cents damages, and nineteen dollars and fifty cents costs, or for any other sum or sums entered or rendered in the Circuit Court for Rock County, in the State of Wisconsin, for or upon the identical promises and undertakings, or any or either of them mentioned in the said plaintiffs' declaration.

Amendment allowed by the Court, January 19, 1857.

And the said plaintiffs say, that no judgment was given by the said defendants to the said plaintiffs, at any time before or after the making of the said several promissory notes, or received or accepted by the said plaintiffs in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, nor of the damages sustained by the said plaintiffs, by reason of the non-performance of said promises and undertakings, nor any nor either of them, nor any part thereof; nor did the said plaintiffs at

any time before or after the commencement of this suit, in any way or manner cancel or discharge the said several promises and undertakings in the said declaration mentioned; nor any nor either of them nor any part thereof, as in the said plea in that behalf is alleged; and this, the said plaintiffs pray, may be inquired of by the country, and the said defendants do the like, &c.

WM. P. LYNDE,
Attorney.

Rejoinder.

And afterwards, to wit, on the thirteenth day of January, A. D. 1857, came the said defendants, by their said attorneys, and filed their rejoinder.

District Court of the United States, for the District of Wisconsin.

A. HYATT SMITH et al.
v.
HENRY C. BOWEN et al.

And the said defendants, as to the replication of the said plaintiffs to third plea of the said defendants, say, that the said plaintiffs ought not, by reason of anything by them in the said replication alleged, to have or maintain their aforesaid action thereof against the said defendants, because the said defendants say, that although it is true that the judgment in the said defendants' third plea mentioned, was set aside, as to A. Hyatt Smith, as irregular and void, for cause shown by him, as mentioned in the said plaintiffs' replication to the said defendants' third plea; and although it is also true that the said judgment, in the said defendants' third plea mentioned, was, on the sixth day of July, A. D. 1855, on motion of the said plaintiffs, vacated, opened, set aside, and held for nought, as against the said Henry O. Clark and Ira Justin, Jr., as mentioned in the said replication of the said plaintiffs to the said defendants' third plea; yet the said defendants say, that the said judgment was so opened, vacated, and set aside, and held for nought as against said Clark and Justin, without the consent of the said defendants, or either of them, and against the expressed wishes of the said defendants, and the wishes of each and every of them.

And these defendants further aver, that when the said Circuit Court, for Rock County, assumed to set aside and vacate the said judgment, at the time mentioned in the said replication to the said third plea, to wit, on the sixth day of July, A. D. 1855, the said Circuit Court for Rock County had no legal power or authority to vacate and set aside the said judgment.

That afterwards, to wit, on the 28th day of December, A. D. 1855, the said defendant, A. Hyatt Smith, feeling himself aggrieved by the decision and judgment of the said Circuit Court for Rock

County, in vacating, opening, and setting aside the said judgment, as to the said Clark and Justin, prosecuted and sued out of the Supreme Court of the State of Wisconsin, a writ of error to the said Circuit Court, for Rock County, duly tested and issued out of and under the seal of the said Supreme Court, and bearing date on the said 28th day of December, A. D. 1855, returnable on the third Tuesday of June, A. D. 1856, for the purpose of reviewing and reversing the decision and judgment of the said Circuit Court, for Rock County, in vacating, opening, and setting aside the said judgment, as to the said Clark and Justin, which writ of error was afterwards, to wit, on the 29th day of December, A. D. 1855, duly served upon E. P. King, Esq., Clerk of the said Circuit Court, by delivering the same to the said Clerk, and was by him then, to wit, on the 29th day of December, A. D. 1855, at the City of Janesville, in said Rock County, duly filed by him, the said Clerk, in his office in said City of Janesville.

And the said defendants further aver, that the said defendants, H. O. Clark and Ira Justin, feeling aggrieved by the decision and judgment of said Circuit Court for Rock County, in vacating, opening, and setting aside the said judgment, as to them, the said Clark and Justin, did also, on the 28th day of December, A. D. 1855, prosecute out of the Supreme Court of the State of Wisconsin, a writ of error to the said Circuit Court for Rock County, for the purpose of reviewing and reversing the decision and judgment of the said Circuit Court for Rock County, in vacating, opening, and setting aside the said judgment, as against the said Clark and Justin, which writ of error was duly sealed and tested on the 28th day of December, A. D. 1855, and was returnable on the third Tuesday of June, A. D. 1856, before the Justices of the said Supreme Court. And the said writ of error was afterwards, to wit, on the 29th day of December, A. D. 1855, duly served upon the said Circuit Court for Rock County, by delivering the same to E. P. King, Esq., Clerk of the said Circuit Court, and was by the said Clerk on that day filed in his the said Clerk's office, in the City of Janesville in said Rock County.

And the said defendants aver, that by means of the issuing and serving of the said writs of error, as above set forth, the said cause, in which the said judgment, mentioned in the said defendants' third plea, was rendered, was removed to and is now pending in the Supreme Court of the State of Wisconsin.

And the said defendants further aver, the said writs of error, and the cause thereby removed, as aforesaid, are still and undetermined in the Supreme Court, and not heard, dismissed, or discontinued, and this the said defendants are ready to verify; wherefore, they pray judgment if the said plaintiffs ought to have or maintain his aforesaid action thereof against them, the said defendants.

BENNETT, SLOAN, & PATTEN,
Att'ys for Defendants.

I hereby certify, that in my opinion the above rejoinder is well founded.

JOHN R. BENNETT,
Attorney and Counsellor at Law.

Dated January 13, 1857.

And afterwards, to wit, on the fourteenth day of January, A.D. 1857, came the said plaintiffs, by their said attorneys, and filed their demurrer to the rejoinder, as follows:

District Court U. S., District of Wisconsin.

HENRY C. BOWEN et al.
v.
A. HYATT SMITH et al.

Demurrer to Rejoinder.

And the said plaintiff, as to the rejoinder of the said defendants, by them rejoined to the replication of the said plaintiffs, replied to the said third plea of the said defendants by them, to the said declaration of the said plaintiffs, say, that the said rejoinder, and the matters therein contained, in manner and form as the same are therein set forth, are not sufficient in the law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and that the said plaintiffs are not bound by law to answer the same; and the said plaintiff specifies the following causes of demurrer:

First. The said rejoinder departs from the said third plea of the said defendants.

Second. The said writs of error, mentioned in the said rejoinder, do not revive, reinstate, or re-enter the said judgment against the said defendants, Ira Justin, Jr., and Henry O. Clark.

Third. A writ of error is not the proper writ to be used for the purpose of removing the record of the said order, vacating said judgment, to the Supreme Court of this State, for the purpose of reviewing the said order made by the said Circuit Court.

Wherefore, for want of a sufficient rejoinder to the said replication, the said plaintiffs pray judgment and their damages, &c.

FINCH & LYNDE,
Plaintiff's att'ys.

I certify, that I have examined the third plea of the said defendants, the replication thereto, and the rejoinder of the said defendants to said replication, and am of the opinion that the demurrer above to the said rejoinder is well founded in point of law.

J. A. SLEEPER,
Counsellor at Law.

And now, at this same time, to wit, on the eleventh day thereof, to wit, on the nineteenth day of January, A. D. 1857, the following proceedings were had, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH. } At law.

The demurrer of the said plaintiffs to the rejoinder of the said defendants, by them rejoined to the said replication of the said plaintiffs, by them replied to the said third plea of the said defendants, by them pleaded to the said declaration, came on to be heard, and was submitted. Whereupon, it is considered by the Court that the said demurrer be sustained, and that the rejoinder is not sufficient in the law to bar or preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants; and came the plaintiffs, by their counsel, and on their motion leave was given by the Court to amend their replication to the sixth plea.

And afterwards, to wit, on the twelfth day of said term, to wit, on the twentieth day of January, A.D. 1857, the following proceedings were had, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH. } At law.

This day came the parties by their counsel, and the issues herein joined came on to be tried. Whereupon, a jury was called to try the same, who came, to wit: John H. Tesch, George J. Fowler, S. L. Rood, James Morton, Samuel Sueton, James Murray, S. C. West, Martin Delany, James B. Kellogg, Samuel Chandler, Joel Hood, John H. Eldridge, twelve free, honest, and lawful men of the district, who were severally sworn, empanelled, and charged by the court. The said jurors of the jury aforesaid, upon their said oaths respectively do say, that the said defendants did assume and promise in manner and form as the said plaintiffs have herein declared against them; and they do further find the several other issues in favor of the plaintiffs, and do assess the damages to the said plaintiffs at the sum of nine thousand four hundred and forty dollars and sixty-eight cents.

And afterwards, to wit, on the thirteenth day of said term, to wit, on the twenty-third day of January, A.D. 1857, the following proceedings were had, to wit.

Judgment.

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE, *v.* HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH. } At law.

This day came the plaintiffs by their counsel, and on their motion it is considered and adjudged by the court now here, that the said plaintiffs have and recover of the said defendants, Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, the sum of nine thousand four hundred and forty dollars and sixty-eight cents, so as aforesaid assessed by the jury, together with the sum of one hundred and seventy-one dollars and thirty-three cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment roll signed, January 23, A.D. 1857.

B. K. MILLER, Clerk.

Damages, ...	$9440 68
Costs, ...	171 33
	$9612 01

Judgment roll filed, January 23, A.D. 1857, at 5 o'clock, P.M.

B. K. MILLER, Clerk.

And afterwards, to wit, on the sixteenth day of said term, to wit, on the third day of February, A.D. 1857, the following proceedings were had, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE, *v.* HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH. } At law.

This day came the parties by their counsel, and a bill of exceptions was signed and filed.

Which said bill of exceptions is as follows:

Bill of Exceptions.

United States District Court, for the District of Wisconsin.

HENRY O. CLARK, A. HYATT SMITH, and IRA JUSTIN, JUNIOR, *v.* HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE.

Afterwards, to wit, at a term of the said court, held at the court

rooms in the City of Milwaukie, in said District of Wisconsin, on the twentieth day of January, in the year one thousand eight hundred and fifty-seven, before Andrew G. Miller, Esquire, Judge of said court, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of said District of Wisconsin, for that purpose duly empanelled, good and lawful men of said district, at which day came there as well the said plaintiffs as the said defendants by their respective attorneys as aforesaid. And the jurors of the jury aforesaid, empanelled to try the said issues, being called, also came and were then and there in due manner chosen and sworn to try the same issue. And upon the trial of that issue, the counsel for the said plaintiffs, to maintain and prove the said issue upon their part, gave in evidence the promissory notes, copies of which are appended to said plaintiffs' declaration aforesaid, and rested their case.

And thereupon, the counsel for said defendants, to maintain and prove the said issue on their part, offered in evidence a paper writing in the words and figures following, viz., marked "A."

"We have this day received from H. O. Clark & Co., full satisfaction for all indebtedness heretofore and now existing on the part of said firm to us. And we do hereby admit payment of cancel all notes executed by said firm of H. O. Clark & Co., and all notes executed by said firm and indorsed by A. K. Norris. The consideration of this release is, that H. O. Clark & Co. have confessed judgment this day to us for the whole amount due us.

JANESVILLE, July 3d, 1854.

BOWEN & McNAMEE,
Pr. A. GILKISON."

And it was then and there admitted by the counsel for said plaintiffs in open court, before the court and jury aforesaid, that Anthony Gilkison, whose name is signed to said paper writing, as the agent of said plaintiffs, was at the time of executing said paper writing the agent of the said plaintiffs, and that the said paper writing, and the names thereto of the said plaintiffs, and of the said Anthony Gilkison, were in the handwriting of the said Gilkison, whereupon the said paper writing was received and read in evidence on the part of said defendants, who then rested their case.

And thereupon, the counsel for the said plaintiffs offered in evidence a judgment record of the Circuit Court for Rock County, in the said State of Wisconsin, including the motion papers to set aside the said judgment as to said A. Hyatt Smith, and the motion papers to set aside said judgment as to said defendants Henry O. Clark & Ira Justin, Jr., and also the orders vacating said judgments, a copy of which said judgment record, motion papers, or orders, is hereto annexed, marked "B."

To which record, motion papers, and orders, the said defendants' counsel did then and there object as incompetent and immaterial,

which objection was overruled by the judge, and said judgment record, motion papers, and orders, received in evidence, to which decision said defendants' counsel did then and there except; which said judgment record, motion papers, and orders, were then and there read in evidence.

Said plaintiffs then offered in evidence the record of a cause in the said District Court, in a suit in equity, between said Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, and said defendants Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, a copy of which is hereto annexed.

To each and all of which said papers, said defendants' counsel then and there objected, as being irrelevant, incompetent, and immaterial, which said objection was then and there overruled by said judge, to which decision the said defendants' counsel did then and there except.

The plaintiffs then read in evidence the bill of complaint, the several answers of Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, the decree of the said District Court, and the original assignment marked "D," and all hereto annexed.

It is conceded by defendants, that the judgment in the Circuit Court was confessed at the time of the execution of the assignment, and that the assignment was to secure the judgment, and the judgment and assignment were the mode adopted to secure the plaintiffs' debt, and that Clark executed the assignment and judgment for Smith.

The cause was then submitted to the jury, and after argument of counsel for the respective parties, the court charged the jury, that the judgment confessed and entered in the Circuit Court of Rock County was valid, and the notes in suit merged in it, until it was vacated and set aside by that court. If the assignment and the judgment were objected to and resisted by Smith, and the judgment opened at the instance of Smith and the other parties, and the assignment was rescinded by Smith and these other defendants, by taking back the property, the original debt was revived, and the receipt is not a bar to this suit. The Circuit Court of Rock County had the power to vacate the judgment as to all the defendants. It does not appear that the notes in suit were ever given up to the defendants. To which charge the defendants excepted.

And because the matter of said exceptions do not appear in the record of the said cause, the said defendants have caused this bill of exceptions to be made, signed, and sealed, according to the rules and practice of the said Court.

Dated, February 3, 1857.

A. G. MILLER. [SEAL.]

Which said paper writing, referred to in said bill of exceptions, and marked "A.," being a receipt to H. O. Clark & Co. by A. Gilkison, and introduced by the defendants, is in the words and figures following, to wit:

Schedule A.

We have this day received from H. O. Clark & Co. full satisfaction for all indebtedness, heretofore and now existing, on the part of said firm to us. And we do now hereby admit payment of cancel all notes executed by said firm of H. O. Clark & Co., and all notes executed by said firm and indorsed by A. K. Norris. The consideration of this release is, that H. O. Clark & Co. have confessed judgment this day to us for the whole amount due us.

BOWEN & McNAMEE,
By A. GILKISON.

JANESVILLE, July 3d, 1854.

Which said transcript of a judgment record from the Circuit Court of Rock County, Wisconsin, referred to in said bill of exceptions, and marked "B.," is in the words and figures following, to wit:

Schedule B.

State of Wisconsin, Rock County, *ss.*

Pleas in the Circuit Court of the First Judicial Circuit of the State of Wisconsin, in and for the County of Rock, of the June Term of said Court, in the year 1854, to wit, the 3d day of July, 1854.

Witness: J. R. DOOLITTLE, ESQ.,
Judge.

GEO. W. CRABLE,
Clerk.

State of Wisconsin, Rock County, *ss.*

Know all men by these presents, that we, the subscribers, Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, doing business under the name of H. O. Clark & Co., are justly indebted unto Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, partners in trade, doing business in the City and State of New York, under the name, style, and firm of Bowen & McNamee, in the full and just sum of seven thousand nine hundred and fifty dollars and seventy-five cents, for goods, wares, and merchandise sold and delivered by the partners of said firm of Bowen & McNamee before this day to us, the subscribers, at our previous request, at the said City of New York, to wit, at Janesville, in said county.

Now, therefore, in consideration of the premises, we do hereby make, constitute, and appoint Charles S. Jordan, Esq., to be our true and lawful attorney, irrevocable, for us, and in our name and stead to enter our appearance before the Circuit Court for the County of Rock aforesaid, this day, or any day hereafter, to waive the service of process, and confess a judgment in favor of the said Henry C.

Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, upon the said indebtedness for the above sum, together with costs; and, also, to file a cognovit for the said amount, and to release all errors, that may intervene in entering up said judgment, or in issuing the execution thereon, hereby ratifying and confirming all which our said attorney may do by virtue hereof.

Witness our hands and seals, at Janesville, in said county, this 3d day of July, A. D. 1854.

In presence of

H. O. CLARK, [SEAL.]
IRA JUSTIN, JR., [SEAL.]
A. HYATT SMITH, [SEAL.]
By H. O. CLARK,
Partner.

State of Wisconsin, Rock County, *ss.*

Circuit Court for said county, of the 3d day of July, in the year of our Lord one thousand eight hundred and fifty-four.

Rock County, *ss.*

Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone who for five years next before this day, have been and now are partners in trade in the City and State of New York, doing business under the name, style, and firm of Bowen & McNamee, plaintiffs in this suit, by Matt. H. Carpenter, attorney, come into the said Court, and file this their declaration, and commence this their suit, without previous process, according to the form of the statute in such case made and provided, and complain of Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, who, for five years next before this day, have been and now are partners in trade, under the name and style of Henry O. Clark & Co., doing business under that name, defendants in this suit, of a plea of trespass upon the case upon promises.

For that whereas the said defendants heretofore to wit, on the 1st day of July, in the year of our Lord one thousand eight hundred and fifty-four, at Janesville, in said County of Rock, were indebted to the said plaintiffs in the sum of twelve thousand dollars, for divers goods, wares, and merchandise, before that time sold and delivered by the said plaintiffs to the said defendants, and at the special instance and request of the said defendants; and being so indebted, and in consideration thereof, the said defendants afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay them the said sum of money above mentioned, when they, the said defendants, should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendants were indebted to the said plaintiffs in the further sum of twelve thou-

sand dollars, for the work and labor, care and diligence of the said plaintiffs, before that time done, performed, and bestowed by the said plaintiffs in and about the business of the said defendants, and at the like special instance and request of the said defendants, and also for divers materials, and other necessary things, by the said plaintiffs, before that time, found, furnished, provided, used, and applied in and about that business, work and labor for the said defendants, at the like special instance and request of the defendants; and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay the said sum of money last above mentioned, whenever the said defendants should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendants were indebted to the said plaintiffs in the further sum of twelve thousand dollars, for so much money by the said plaintiffs before that time lent and advanced to the said defendants, at their like special instance and request; and being so indebted, and in consideration thereof, they, the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay the said plaintiffs the said sum of money last above mentioned, whenever the said defendants should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendants were indebted to the said plaintiffs in the further sum of twelve thousand dollars, for so much money by the said plaintiffs before that time paid, laid out, and expended, to and for the use of the said defendants, at their like special instance and request; and being so indebted, and in consideration thereof, they, the said defendants, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay to the said plaintiffs the said sum of money last above mentioned, whenever the said defendants should be thereunto afterwards requested.

And for that whereas also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiffs in the further sum of twelve thousand dollars, for so much money by the said defendants before that time had and received, to and for the use of the said plaintiffs; and being so indebted, and in consideration thereof, they, the said defendants, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay to the said plaintiffs the said sum of money last above mentioned, whenever the said defendants should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the day and year, and at the place aforesaid, the said defendants were indebted to the

said plaintiffs in the further sum of twelve thousand dollars, for so much money before that time and then and there due and payable from the said defendants to the said plaintiffs, for interest upon, and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiffs, and by the said plaintiffs forborne to the said defendants, for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants; and being so indebted, and in consideration thereof, the said defendants undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money, whenever they, the said defendants, should be thereunto afterwards requested.

And for that, whereas also the said defendants afterwards, to wit, on the day and year, and at the place aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due and owing, and then in arrear and unpaid; and, upon such accounting, the said defendants were then and there found to be in arrear, and indebted to the said plaintiffs in the further sum of twelve thousand dollars, and being so found in arrear and indebted, they, the said defendants, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay to the said plaintiffs the said sum of money above specified, whenever they, the said defendants, should be thereunto afterwards requested.

Nevertheless, the said defendants (although often requested, &c.) have not as yet paid the said several sums of money, or any or either of them, to the said plaintiffs; but the said defendants to pay the same, or any part thereof, to the said plaintiffs, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of twelve thousand dollars, and therefore bring suit, &c.

MAT. H. CARPENTER,
Pl'tff's Att'y.

State of Wisconsin, Rock County, *ss.*

In Circuit Court for said County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al. } Assumpsit.

Here in court comes the said defendants, by Charles S. Jordan, their attorney, and defend the wrong and injury, when, &c., and say that they cannot deny the said action of the said plaintiffs, nor but that they the said defendants did undertake and promise in manner and form as the said plaintiffs hath above thereof complained against them, nor but that they the said plaintiffs have sustained damages on occasion of the not performing of the said several promises and un-

dertakings in the said declaration mentioned, over and above their costs and charges by them about their suit in this behalf expended, to seven thousand nine hundred fifty dollars seventy-five cents.

CHARLES S. JORDAN,
Attorney for Defendants.

State of Wisconsin, Rock County, *ss.*

In Circuit Court for said County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

M. H. Carpenter, Att'y. July 3, 1854.

On reading and filing cognovit in this cause, whereby the damages of the said plaintiffs are confessed at seven thousand nine hundred and fifty dollars and seventy-five cents, besides costs, on motion of M. H. Carpenter, attorney for plaintiffs, ordered judgment final thereon.

State of Wisconsin, Rock County, *ss.*

In Circuit Court for said County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

Therefore, it is considered by the said Court now here, that the said plaintiffs do recover of the said defendants their damages aforesaid to seven thousand nine hundred and fifty dollars and seventy-five cents, in form aforesaid acknowledged, and also nineteen dollars and fifty cents for their said costs and charges by the said Court, now here adjudged to the said plaintiffs and with their assent.

Which said damages, costs, and charges, in the whole, amount to seven thousand nine hundred and seventy dollars and twenty-five cents.

And the said defendant in mercy, &c.

A motion having been made in this cause to set aside and vacate the judgment entered in this cause, and the execution issued thereon as to said defendant, A. Hyatt Smith, and the same having been argued by counsel, and the Court desiring further time to consider the said motion, it is ordered that all proceedings in this cause may be stayed until the order of this Court.

Dated this 15th day of December, A. D. 1854.

J. R. DOOLITTLE,
Judge.

This motion having been brought on to be heard, and it appearing

that judgment was entered up in vacation against the defendant, A. Hyatt Smith, without the service of process, upon the appearance of an attorney out of court, but without any sufficient authority, ordered, on motion of Sloan & Patten, attorneys for said defendant, A. Hyatt Smith, that the judgment entered up against the said A. Hyatt Smith, and all subsequent proceedings be set aside as to him, as irregular and void, but without prejudice to the plaintiff's rights against the property of the other defendants.

Circuit Court, Rock County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

Rock County, *ss.*

Joseph A. Sleeper, of said county, being duly sworn, says, that he is now the attorney and counsel of the above-named plaintiffs, in relation to the subject-matter of and the debt for which the judgment in this cause was recovered. And he saith that during the forenoon of the 28th inst., he was handed by Charles S. Jordan, Esquire, copy affidavits and notice of motion to set aside the judgment in this cause, and the execution issued thereon as to the defendant, A. Hyatt Smith, which notice is for the thirtieth day of November, inst., and he further saith that he was informed by Mr. Jordan when he delivered him the said papers, that they had been served upon M. H. Carpenter, Esquire, the evening before, and that Mr. Carpenter being the counsel of H. O. Clark & Co., the defendants in said judgment, could not act for the plaintiffs in resisting this motion. This deponent immediately applied to Mr. Carpenter for information on the subject, and stated to him what Mr. Jordan had informed this deponent, or the substance, and said to Mr. Carpenter that he should want him to make an affidavit to resist the motion. Mr. Carpenter then told this deponent that he drew up the warrant of attorney in this cause by the direction of H. O. Clark, one of said defendants, and as the attorney and counsel of the defendants therein; that he appeared nominally for the plaintiffs simply to save the defendants costs; that in all he did in relation to perfecting the judgment in this cause, he acted in fact the attorney of the defendants, and at their request, and by their direction, made to him through or by said Henry O. Clark, and that though nominally appearing as attorney for plaintiffs on the record, yet that he really in fact was not their attorney, but the attorney of the defendants, and could not act for them.

This deponent further saith, that the plaintiffs are citizens of the State of New York, and reside in the City of New York, as this deponent is advised and believes, and that Anthony Gilkison, who is mentioned in the affidavits of A. Hyatt Smith and Henry O. Clark,

which were delivered to this deponent by said Jordan, as aforesaid, is somewhere in the Western States, but where this deponent does not know; but the last this deponent has heard from said Gilkison, he was in the City of Cincinnati, in the State of Ohio. This deponent expects that said Gilkison will be in Janesville some time during the next month, but does not expect him before the last of next month. And this deponent, from conversation which he has had with said Gilkison, and verily believes that the testimony of said Gilkison is material for the plaintiffs on the hearing of the said motion, and that he cannot, with safety to the plaintiffs in this case, resist the said motion without having the testimony of said Gilkison to be used thereon.

And he further saith, that he verily believes that the testimony of Matthew Carpenter is material to the plaintiffs upon said motion, but that said Carpenter declines voluntarily making an affidavit, for the reason that his relation to the defendants is such that he deems it improper; and this deponent cannot obtain the testimony of said Carpenter, except upon a commission or order of this Court, requiring him to give his evidence to be used on the hearing of the motion above referred to; and he further saith, that he has not had time to make any preparation to resist said motion, and had the notice been for a longer time, he could not have made a full preparation in the case, for the reasons above set forth.

And he further saith, that he verily believes he shall not be able to procure the evidence of said Gilkison, during the present term of this Court. And further saith not.

J. A. SLEEPER.

Subscribed, and sworn before me, this 30th day of Nov. 1854.

JOHN R. BENNETT,
Notary Public.

Circuit Court, Rock County.

HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH,
v.
HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE.

State of Wisconsin, Rock County, *ss.*

Henry O. Clark, one of the defendants in the above-entitled cause, being duly sworn, deposes and says, that he executed for himself and for said defendant Smith, the warrant of attorney to Charles S. Jordan, Esq., upon which judgment was confessed and entered in this cause, on or about the third day of July last, in favor of said plaintiffs and against said defendants; that on or about said third day of July, one Anthony Gilkison, an agent of said plaintiffs, and

said Charles S. Jordan, applied to this deponent to confess a judgment for the firm of H. O. Clark & Co., said firm being composed of the above-named defendants, in favor of said plaintiffs; that said Gilkison, as such agent, assured this deponent, that said plaintiffs only wished to have their demands against said firm secured, and told this deponent, that if said firm would secure the payment of said demands, by confessing a judgment in favor of said plaintiffs, execution should not be issued on such judgment, and that said firm might have any time it might wish to extricate itself from embarrassment, and pay said demands of said plaintiffs.

And this deponent further says, that he told said Jordan and said Gilkison that this deponent had no authority from said Smith, to execute for him a warrant of attorney for the confession of a judgment against him, said Smith. Whereupon, said Jordan, an attorney at law, who was then, and for a long time had been retained as one of the attorneys of said defendants, advised this deponent that this deponent had the right to execute such warrant of attorney for said Smith, to confess a judgment against him, by virtue of the partnership existing between said Smith and this deponent.

And this deponent further says, that, believing if this deponent should authorize the confession of a judgment against said defendants, and in favor of said plaintiffs, execution would not be issued thereon, and that said firm might have any time it might desire to pay said demands, and being as aforesaid advised by said Jordan that this deponent had the right so to do, this deponent executed the warrant of attorney herein before mentioned for himself and for said defendant, A. Hyatt Smith.

And this deponent further saith, that he had no authority from said Smith to execute for him said warrant of attorney, unless this deponent had authority as partner of said Smith; that said Smith was, at the time said warrant of attorney was executed, absent from home, and as this deponent is informed and believes, at the City of Washington, and that said warrant of attorney was executed without the knowledge or consent of said Smith; that when said Smith returned home, this deponent informed him what this deponent had done with respect to said warrant of attorney, and that judgment had been confessed and entered thereon; that said Smith objected thereto, and refused to sanction or acquiesce in the same, and said he would not submit to said judgment as against himself, for the reason that this deponent had no right or authority to sign his name to said warrant of attorney, upon which, said judgment was confessed and entered.

H. O. CLARK.

Sworn to before me, this 27th day of November, A.D. 1854.

L. F. PATTEN,
Notary Public.

Circuit Court, Rock County.

HENRY O. CLARK, IRA JUSTIN, Jr., and A. HYATT SMITH,
v.
HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE.

Rock County, *ss.*

A. Hyatt Smith, one of the defendants above named, being duly sworn, deposes and says, that he is now and for many years has been a resident of Janesville, in said County of Rock; that he was, on the third day of July, A.D. 1854, and for a long time previous thereto, had been a member of the firm of H. O. Clark & Co., doing business in Janesville as aforesaid. That said firm was composed of said defendant, Henry O. Clark, and this deponent; said Ira Justin, Junior, being only a nominal partner therein. That he received a salary for his services, and never had any interest in the profits and losses of said firm.

And this deponent further saith, that on or about the said third day of July last, as this deponent is informed and believes, a judgment was entered in this Court upon a certain warrant of attorney against said above-named defendants, and in favor of said plaintiffs, for the sum of seven thousand nine hundred and seventy dollars and twenty-five cents or thereabouts, damages and costs, and execution issued thereon, as appears from the record thereof, now on file in the office of the Clerk of this Court, to which record this deponent hereby refers, and makes the same a part of this affidavit.

And this deponent further saith, that he left his said residence on or about the tenth day of June, A.D. 1854, for the City of Washington, and was absent from the State of Wisconsin from that time, until about the fifteenth day of August, 1854, at which time this deponent returned home. That he was at the City of Washington on said third day of July, when said warrant of attorney, upon which said judgment was entered, was executed; that this deponent did not himself execute said warrant of attorney, and never, in any manner, authorized any person or persons to execute said warrant of attorney for him; and that the execution of said warrant of attorney, and the confession and entry of judgment thereon, were and still are against the wishes and consent of this deponent; that this deponent knew nothing whatever of said warrant of attorney, or of said confession of judgment until some time after his return from Washington at the time aforesaid; and that this deponent has never consented to nor sanctioned the execution of said warrant of attorney, or the confession of said judgment.

And this deponent further saith, that shortly before he left his residence for Washington as aforesaid, one Antony Gilkison, as agent

for said plaintiffs, came to this deponent, and said defendant Clark, and requested *and requested* that said firm of H. O. Clark & Co. should confess a judgment to said plaintiffs, for the full amount of the indebtedness of said firm, in order to give said plaintiffs a preference over the other creditors of the said firm of H. O. Clark & Co. That said defendants, Clark and this deponent, did each of them, in answer to said request, positively declare to said Gilkison, that said firm would not comply with such request, and further declared that if it should become necessary for said firm to bring its business to a close, that all its creditors should have an equitable share of its effects; that said Gilkison then renewed said request, and urged as a reason why it should be complied with, that the said Gilkison had always been a particular friend of said Clark, and had on account of such friendship, in his capacity of agent, favorably represented said firm of H. O. Clark & Co. to his principals. That if such judgment were confessed, he would continue to make favorable reports of said firm to his principals, and that execution should not issue on such judgment, within two years from the time of its confession; that said Clark and this deponent did each of them again refuse to confess such judgment, and this deponent stated to said Gilkison, that deponent would recognize no special obligations to said plaintiffs, because their agent happened to feel friendly to Mr. Clark.

And this deponent further saith, that the whole amount of the indebtedness of said firm of H. O. Clark & Co., to said plaintiffs on said third day of July, was about the sum of eight thousand dollars, of which indebtedness the sum of only about two thousand dollars had then become due; that the remainder thereof became due as follows: the sum of about one thousand dollars on the 30th July; the further sum of about one thousand on the 30th day of August. The sum of two thousand and sixteen dollars on the 30th day of October, and the remaining sum of about two thousand dollars on the thirtieth day of December, 1854.

And this deponent further saith, that he is informed and believes that Charles S. Jordan, the attorney named in said warrant of attorney, and who signed the cognovit on which judgment was entered in this cause, is wholly irresponsible, and unable to respond in damages for any injury resulting to this deponent, by reason of entering said judgment as aforesaid.

(Signed) A. HYATT SMITH.

Subscribed, and sworn to before me, this 14th day of November, A. D. 1854.

L. F. PATTEN,
Notary Public.

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Circuit Court, Rock County.

HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH,
v.
HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE.

Sir: Please take notice, that upon affidavits, with copies of which you are herewith served, a motion will be made, at the next term of this Court, appointed to be held in and for the County of Rock, at the court-house, in the town of Janesville, on the thirtieth day of November, instant, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a rule or order to set aside and vacate the judgment entered in this cause, and the execution issued thereon, as to the said defendant A. Hyatt Smith; and for such other and further rule or order as the Court may see fit to grant, together with costs of this motion, for the following reasons, viz.:

1st. That said Smith did not himself execute the warrant of attorney upon which said judgment was confessed.

2d. That said defendant Clark, as partner of said Smith, had no right or authority to execute said warrant of attorney for said Smith, or in his name.

3d. That said Clark had no authority from said Smith to execute said warrant of attorney for or in the name of said Smith.

4th. That said Smith has never assented to said execution of said warrant of attorney by said Clark, nor assented to or acquiesced in said judgment as against himself.

5th. That said judgment was irregularly entered, and that it is void as against said Smith.

Yours, &c.

J. C. SLOAN,
Att'y for said Def't. Smith.

Dated Nov. 24, 1854.

To M. H. CARPENTER, Esq.,
Pl'ffs' Att'y.

Circuit Court for Rock County.

HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH,
v.
HENRY C. BOWEN et al.

November Term, 1854.

This motion having been brought on to be heard, and it appearing that judgment was entered up in vacation against the defendant, A.

Hyatt Smith, without the service of process, upon the appearance of an attorney out of court, but without any sufficient authority: ordered, on motion of Sloan and Patten, attorneys for said defendant, A. Hyatt Smith, that the judgment entered up against the said A. Hyatt Smith, and all subsequent proceedings, be set aside, as to him, as irregular and void, but without prejudice to the plaintiffs' rights, as against the property of the other defendants.

Grounds of Decision.

I. As partner, Clark had no power to confess a judgment out of court in vacation against his co-partner.

II. His power, as agent, to encumber the property of Smith, does not imply a power to appear in court and submit to its jurisdiction in vacation. § 13, R. S. 535. He might have created a lien by deed, but to submit the person as well as the property of his co-partner to the jurisdiction of a court, requires, in my judgment, within the fair intention of that section, a special authority for that purpose.

J. R. DOOLITTLE,
Circuit Judge.

Circuit Court, Rock County.

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE,
v.
HENRY O. CLARK and IRA JUSTIN, JR.

Rock County, *ss.*

Anthony Gilkison, of the City of New York, in the State of New York, being duly sworn, says, that he is the agent of the above-named plaintiffs in relation to the subject-matter of the judgment in this case. And he saith, that the indebtedness for which the judgment herein was confessed, was for goods, wares, and merchandise, sold by the plaintiffs to the firm of H. O. Clark & Co., which firm was composed of Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., and he saith that the same became due before the date of said judgment, and that the said firm were unable to pay such indebtedness when it became due, as aforesaid, and being so unable, the said Henry O. Clark, on behalf of his said firm, applied to the plaintiff for an extension of credit, or for further time in which to pay the same, and did then and there represent that his said firm, though then embarrassed, was able to pay all their debts in full, if they could but obtain a little time. And he saith that the said plaintiffs verily believed that the statement of said Clark, in relation to the ability of his said firm to pay their debts, were true, and being willing to and then did, therefore, extend and give day of payment of the said indebtedness from about the first day of May, A.D. 1854, to the

month of December, 1854, payable in monthly payments of about equal sums, and took their notes therefor. And he saith, that after the giving such extension, and after the first note had become due, which was not paid at maturity, but was protested for non-payment, this deponent came from the City of New York to the City of Janesville, where the said firm carried on business, for the purpose of obtaining payment, or security for the payment, of the said note so past due, and thereafter to become due, and for that purpose applied to the said Henry O. Clark for payment of said note so due, and for security, in some form, for the payment of the other notes to become due.

And he saith that said Clark expressed his willingness so to do, and for the purpose of carrying the arrangement into effect, this deponent and said Clark went to the said A. Hyatt Smith, and requested him to act with said Clark in the matter, and in some way to give the said plaintiffs security for the payment of their said notes.

And he saith, that said Smith did absolutely refuse so to do, but assured this deponent that all the indebtedness of said firm would be paid, and that he expected to have them to pay, and that he should lose money on account of the indebtedness of said firm.

And he saith, failing in obtaining payment of or security for the indebtedness of said firm to the said plaintiffs, he left the City of Janesville, and went into other parts of the State of Wisconsin, and into the State of Illinois.

And he saith, that after an absence of about two weeks, he returned to the City of Janesville for the purpose of making further efforts to obtain payment and security for the said indebtedness of said firm to the plaintiffs.

And he saith, that upon his return he learned that the said A. Hyatt Smith had left the City of Janesville, and gone to the City of Washington, in the District of Columbia.

And he saith, that when he was first in Janesville, as hereinbefore stated, one Ezra Miller was in the store formerly occupied by said firm, and the stock of goods formerly owned by said firm, claiming to own said goods as purchaser thereof, from said firm of H. O. Clark & Co.

And he saith, that upon his return to Janesville, as aforesaid, which was about the fourth day of July, 1854, the said Miller was in possession of said store and goods. This deponent again saw said Clark, and urged him to secure the said indebtedness to the plaintiffs in some way, which said Clark then agreed to do, but did not indicate in what manner or way it should be done.

And he saith, that said Clark thereupon consulted with his counsel and attorneys, M. H. Carpenter and Charles S. Jordan, upon the subject, and upon the matters of the said firm generally, as he informed this deponent, and after such consultation, he informed this deponent, that he had determined upon confessing a judgment for

himself and said Smith, with said Justin, to the said plaintiffs for that purpose, and making an assignment of the property and effects of the said firm, in which the said plaintiffs were to be preferred with other creditors.

And this deponent further saith, that he thereupon asked said Clark if he had power to confess a judgment for said Smith, or make an assignment of the property for the benefit of their creditors in the way proposed, and said Clark thereupon told this deponent that he had full power to confess such judgment or to make such assignment, or to do any and every other thing which said Smith himself could do, under a power of attorney from said Smith to him.

And this deponent further saith, that he also inquired of said Carpenter, whether said Clark had such a power as he represented; and said Carpenter stated that he had. And this deponent further saith, that he never saw or read the said power of attorney, until the twentieth day of August, 1854, when, being again in Janesville, he read the record thereof in the office of the Register of Deeds for Rock County; before which time this deponent did not know what were the terms of such power of attorney. And he saith that when said Clark stated to him that he had the power to confess a judgment for said Smith, and make an assignment of the property, as before stated, he supposed and believed that he had such power; and, so believing, he consented and agreed to take such a judgment against said Clark, Justin, and Smith, for the amount of said indebtedness, as a better security for the payment thereof than was afforded to the said plaintiffs by the said notes of said firm; and thereupon the said Carpenter prepared, what he said were the proper papers for said Clark and Justin to sign, to authorize the confession of a judgment against said Clark, Justin, and Smith; and such judgment was by said Carpenter and said Jordan entered up and perfected in this Court accordingly, they, the said Carpenter and Jordan, acting in fact in all they did therein, as the attorneys and legal advisers of the firm of H. O. Clark & Co., and not as the attorneys of said plaintiffs.

And the deponent further saith, that he was ignorant of the forms and proceedings required by law to be used, had, or taken, to confess a perfect and valid judgment against all of said defendants, but relied implicitly upon the statement of said Clark, above set forth, and the assurance of said Carpenter and Jordan given to him, that said judgment, so confessed, was a legal and valid judgment against said Smith, as well as against said Clark and Justin, and did verily believe, that the same was to all intents and purpose legal, valid, and effectual, to hold and bind the said Smith and all his real estate in the County of Rock.

And he saith that, so believing, he gave to said Clark a receipt of some name or kind referring to said notes, and acknowledging that said judgment had been confessed for and on account of the indebtedness secured by such notes; but this deponent cannot now recollect

the exact terms of said receipt; he therefore cannot state the same more particularly.

But he states the fact to be that he never should have given such receipt, or accepted such confession of judgment, had he not fully believed that said Clark had the power to confess the same for said Smith, and that the same was to all intents and purposes as valid and effectual in the law, as if the power to confess the same had been signed by said Smith in person.

And this deponent further saith, that he never should have taken or accepted a judgment against said Clark and Justin for said indebtedness; and he further saith, that he had no power or authority from the plaintiffs so to do; and he saith, that, at the time when said judgment was perfected, he verily believed that said Clark and Justin were insolvent, and that they had not, to his knowledge, any real estate upon which the same would have been a lien; but then he saith, that said Smith was represented to be a man of large means, and, as this deponent was informed and believed, was possessed of a large amount of real estate, of great value, in the County of Rock, upon which such judgment would be a lien, and that it was for the sole purpose of obtaining a lien upon the said real estate of said Smith, and subjecting his individual property, and the property of said firm or copartnership to the lien and incumbrance of such judgment, and enabling the plaintiffs to apply the same to the payment of said indebtedness, that this deponent consented to the arrangement aforesaid; and because he believed that, by that means, the said plaintiffs would obtain security for the ultimate payment of their said demand.

A. GILKISON.

Subscribed, and sworn, before me, this 27th day of January, A. D. 1855.

CHARLES NORTON,
Notary Public.

Circuit Court, Rock County.

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, HENRY L. STONE,
v.
HENRY O. CLARK and IRA JUSTIN, JR.

To H. O. Clark and Ira Justin, Jr.

Take notice, that on the 28th day of March, 1855, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, we shall move the Court for a rule, or order, vacating and setting aside the judgment heretofore entered, as well against A. Hyatt Smith as against you, or for such other or further order as the plaintiffs may be entitled to, which motion will be founded on the affidavit of Anthony Gilkison, with a copy whereof you are herewith served,

and on the testimony of Matthew H. Carpenter, to be taken in open Court on the hearing of this motion, and on the papers and orders in the cause.

March 26th, 1855.

Yours, &c.,
SLEEPER & NORTON,
Atty's. for Plffs.

I hereby admit due service on me of notice of the motion within named, to be made at the next term of the Circuit Court for Rock County, and of the papers upon which the same will be founded.

June 2, 1855.

CHARLES STEVENS.

Circuit Court, Rock County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

City and County of New York, *ss.*

Charles S. Jordan, of said city, being duly sworn, says, that he was present at the time the assignment from H. O. Clark & Co. to Charles Stevens was executed by Ira Justin, Jr., and H. O. Clark, in their individual names, and by the said H. O. Clark in the firm name of H. O. Clark & Co.; that said assignment was executed at the office of Truesdeel, Jordan & Bennett, in the City of Janesville, and State of Wisconsin; that, at the time of the execution of said assignment, the said H. O. Clark was, in the opinion of this deponent, not incapacitated by reason of intoxication for understanding the provisions contained in said assignment, or the force and effect of the act of making such assignment, but that said Clark did understand fully the force and effect of such act, and that it was in all respects the result of his own free will and desire; that at the same time the said assignment was executed as aforesaid, a "cognovit" was signed by this deponent, as the attorney of the said H. O. Clark, Ira Justin, Jr., and A. Hyatt Smith, in favor of Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, of the firm of Bowen, McNamee & Co., of the City of New York, upon which said "cognovit" the deponent understands and believes judgment was duly entered; that said "cognovit" was so signed by this deponent as aforesaid, by virtue of a warrant of attorney, then and there subscribed by the said H. O. Clark and the said Ira Justin, Jr., in their respective names, and which was also subscribed by the said Clark as follows, viz.: "A. Hyatt Smith, by H. O. Clark, partner."

That Anthony Gilkison, who claimed to act for and on behalf of the said Bowen, McNamee & Co., and to have authority so to act,

was present at the execution of said assignment and warrant of attorney, and that said Gilkison immediately after the execution of said assignment and warrant of attorney, or cotemporaneous therewith, executed a receipt, which was intended, and had the effect, according to the best recollection and belief of this deponent, to cut off, cancel, and release all promissory notes then held by the said firm of Bowen, McNamee & Co. against the said firm of H. O. Clark & Co.; that said receipt or written instrument was so executed by said Gilkison, in pursuance of an understanding then and there existing between the said Gilkison, the said H. O. Clark, and this deponent, that said Gilkison should so execute the same, in consideration of the confession of a judgment which should be a lien upon the separate property of the said A. Hyatt Smith, and this deponent believes, that said Gilkison executed said receipt, or written instrument, for the reason, that he understood that the judgment so entered as aforesaid, would be a lien upon the separate property of said Smith.

This deponent further says, that the assignment and warrant of attorney herein mentioned, were executed on or about the third day of July, in the year eighteen hundred and fifty-four.

CHARLES S. JORDAN.

State of New York, City and County of New York, *ss.*

Be it remembered, that on the 26th day of May, A.D. 1855, at the city aforesaid, before me, Henry C. Banks, a commissioner, resident in said city, duly commissioned and qualified by the executive authority, and under the laws of the State of Wisconsin, to administer oaths and affirmations, and to take depositions to be used therein, personally appeared Charles S. Jordan, of the City, County, and State of New York, to me known to be the same person described in, and who subscribed the annexed deposition in my presence, who, being by me duly and solemnly sworn, pursuant to law, did depose and swear that the matters and things therein contained were true.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the City of New York [SEAL.] aforesaid, this twenty-sixth day of May, A.D. 1855, and of the Independence of the United States the seventy-ninth.

HENRY C. BANKS,
Commissioner, &c., 57 Chambers Street, New York City.

Circuit Court, Rock County, *ss.*

HENRY C. BOWEN et al.
v.
H. O. CLARK et al.

I, Mat. H. Carpenter, on oath say, that I have carefully read the

within affidavit of C. S. Jordan. I further say, that I am knowing to the facts therein stated, except that I say, that I do not know the contents of the said receipt executed by Gilkison, but do know that H. O. Clark was dissatisfied with the first one drawn, and another was prepared to accord with his wishes. I do not think H. O. Clark was disqualified for the transaction of business, when he executed the papers referred to within. I further say, that C. S. Jordan and myself were both acting as counsel for H. O. Clark & Co.; and further say, that H. O. Clark stated in presence of Mr. Gilkison and others, more than once, that he was fully authorized to confess the judgment mentioned within, before the same was confessed.

MAT. H. CARPENTER.

Subscribed, and sworn before me, this 22d day of June, 1855.

J. NICHOLS,
Deputy Clerk.

Circuit Court, Rock County.

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, HENRY L. STONE,
v.
HENRY O. CLARK, and IRA JUSTIN, JR.

To H. O. Clark and Ira Justin, Jr. Take notice, that the affidavit of *of* Charles S. Jordan, with a copy whereof you are herewith served, and to which this notice is subjoined, together with the affidavit of Anthony Gilkison, a copy of which has heretofore been served upon you, will be read and used, together with the testimony of Matthew H. Carpenter, to be taken in open court, and on the papers and orders in this cause, on the hearing of the motion heretofore made and undetermined and unheard in this cause, for a rule or order vacating and setting aside the judgment, heretofore entered against you and A. Hyatt Smith, as against you, or for such other or further order as the plaintiffs may be entitled to, which motion will be brought on for a hearing on the 13th inst., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Yours, &c.,

SLEEPER & NORTON.
Attorneys for Plaintiffs.

June 11th, 1855.

I hereby admit due service on me of the within notice of motion, and of copies of the affidavits and papers upon which the same will be founded, and which are mentioned within.

A. HYATT SMITH.

Circuit Court for Rock County.

HENRY O. CLARK and IRA JUSTIN, JR., }
v.
HENRY C. BOWEN et al. }

State of Wisconsin, Rock County, *ss.*

Henry O. Clark, one of the defendants in the above-entitled cause, being duly sworn, says, that some time in the month of June, A.D. 1854, Anthony Gilkison, the agent of the plaintiffs in the above-entitled cause, called upon this deponent for payment of a note given by the firm of H. O. Clark & Co., to the firm of Bowen & McNamee, the said plaintiffs, of about the sum of two thousand dollars, then due, and security for the demands of the said plaintiffs, against the said firm of H. O. Clark & Co., which were thereafter to become due.

This deponent further says, that said Gilkison claimed, that the said firm of Bowen & McNamee were entitled to a preference over the other creditors of the firm of H. O. Clark & Co., on account of the friendship they had shown this deponent, and the said Gilkison requested this deponent to give them such preference, by confession of judgment or otherwise.

This deponent further says, that he was willing, but unable, to give said Bowen & McNamee security for their demands.

This deponent further says, that he and the said Gilkison called upon the said A. Hyatt Smith, to confer with him in reference to giving the said Bowen & McNamee a preference over the other creditors of the firm of this deponent, by confession of judgment or otherwise. That said Smith thereupon informed the said Gilkison, that whatever confidential relations existed between the said firm of Bowen & McNamee and this deponent, or the said firm of H. O. Clark & Co., he, the said Smith, had no part or lot in them, and that he could not recognize the said plaintiffs or any other creditors for goods sold to the said firm as confidential creditors. And said Smith then absolutely refused to give the said plaintiffs a preference over other creditors of this deponent, said firm, by confession of judgment or otherwise. This deponent further says, that said Gilkison thereupon left the City of Janesville, and went into other parts of the State, as stated in his affidavit, and that soon after the said Smith left Janesville for Washington City.

This deponent further says, that after Smith left for Washington City, the said Gilkison returned to the City of Janesville, on or about the last day of June, and again urged this deponent to give the said plaintiffs a preference, in some way, over the other creditors of H. O. Clark & Co.

This deponent further says, that afterwards, to wit, on the third day of July, A. D. 1854, at the suggestion of said Gilkison, he did, as he is informed and believes, execute a cognovit or warrant of at-

torney, upon which the judgment in the above-entitled cause was entered.

This deponent further says, that said Gilkison never asked this deponent if he had power to execute said cognovit, or confess a judgment for said Smith.

This deponent further says, that said Gilkison knew just as well about the power which this deponent had to confess said judgment as this deponent did himself.

This deponent further says, that on or about the first day of May, A. D. 1854, while this deponent was in New York City, he showed and read to said Gilkison the power of attorney, a copy of which is hereto annexed, marked "A."; and he also says, that, to the best of his knowledge and belief, he did, at the same time, show the said power of attorney to Henry C. Bowen, one of the said plaintiffs.

This deponent further says, that he never told the said Gilkison, or any other person, that he had full powers to confess said judgment, or any judgment, against the said Smith; that he never did, prior to the time of entering up said judgment, say, or pretend to said Gilkison, or to M. H. Carpenter and Charles S. Jordan, or either of them, that he had any power or authority to bind said Smith by confession of judgment or otherwise, except that which was conferred upon him by the said power of attorney, marked "A.," or which he possessed as partner of said Smith.

This deponent further says, he verily believes the said Gilkison understood the force and effect of the said power of attorney as well this deponent.

This deponent further says, that said Carpenter and Jordan had read and knew the contents of the said power of attorney, marked "A.," as well as this deponent, prior to this deponent signing said warrant of attorney.

This deponent further says, that on the first day of July, A. D. 1854, the said Anthony Gilkison informed this deponent that said M. H. Carpenter was then and had been theretofore the attorney of said firm of Bowen & McNamee, and that any arrangement of the demands of Bowen & McNamee, against H. O. Clark & Co., which Carpenter and Jordan would consent to, would meet his approbation.

This deponent further says, that at the request of the said Anthony Gilkison and Charles S. Jordan, he did afterwards, to wit, on the first day of July, retain the said Carpenter as the attorney of said firm of H. O. Clark & Co.

But this deponent further says, that he is informed and actually believes, that the said Carpenter and Jordan, in the matter of entering up the said judgment, and making the assignment mentioned in the affidavit of the said Gilkison, were acting more for the interest of the said firm of Bowen & McNamee than for the interest of H. O. Clark & Co.

This deponent further says, that in confessing judgment, and

making said assignment, to the best of his knowledge and belief, he acted strictly in accordance with the wishes of the said Anthony Gilkison.

This deponent further says, that, to his knowledge and belief, he never misrepresented to said Gilkison, or any other person, any fact in relation to the authority or power he had to act for said Smith.

HENRY O. CLARK.

Subscribed and sworn to before me, this 25th day of June, A.D. 1855.

JOHN R. BENNETT,
Notary Public.

Circuit Court, Rock County.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

June Term, 1855. July 6, 1855.

On reading and filing affidavits and papers, and notice of motions to set aside and vacate the judgment heretofore entered in this cause, by confession, as against the said Henry O. Clark and Ira Justin, Jr., and after hearing Mr. J. A. Sleeper for, and Mr. J. C. Sloan in opposition to said motion, it is ordered, that the said judgment, as against the said Clark & Justin, be, and the same is hereby opened, set aside, vacated, and altogether held for nought. But it is further ordered, that in any suit or proceedings to recover the debt, for which the judgment in this cause was confessed, the said plaintiff shall not be permitted or allowed to recover or claim any greater sum of money than the amount of such judgment, and the interest thereon, from the day the same was confessed, entered, and docketed, until the entry of final judgment in any such suit or proceeding.

State of Wisconsin, Rock County, *ss.*

I, E. P. King, Clerk of the Circuit Court, in and for the County of Rock, do hereby certify that the foregoing are true copies of all the process, pleadings, proceedings, and judgment in a certain cause in the said Court, wherein Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, are plaintiffs, and A. Hyatt Smith, Henry O. Clark, and Ira Justin, Jr., are defendants, and also of all affidavits, motions, notices of motions, and orders made in the said cause since the entry of the said judgment; and I further certify that I have compared the same with the originals now remaining in my office, and that the foregoing are true and correct transcripts therefrom, and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Janesville in

said county, this 2d day of August, in the year of our
[SEAL.] Lord one thousand eight hundred and fifty-six, and of the Independence of the United States the eighty-first.

E. P. KING,
Clerk.
By J. NICHOLS.
Deputy.

Which said bill of complaint, filed by Henry C. Bowen and others, in the District Court of the United States, for the District of Wisconsin, against said Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., and the answers of Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, the original assignment, and the decree of said Court, therein referred to in said bill of exceptions, are in the words and figures following, to wit:

Bill of Complaint.

In the District Court of the United States for the District of Wisconsin. In Equity.

To the Judge of the District Court of the United States, for the District of Wisconsin.

Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, copartners in trade under the name, style, and firm of Bowen & McNamee, of the City of New York, and citizens of the State of New York, and Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, copartners in trade in the name, style, and firm of Sackett, Belcher, & Co., of the City of New York, and citizens of the State of New York, complainants, bring this their bill of complaint in their own behalf and in behalf of such of the bona fide creditors of the firm of H. O. Clark & Co., as may come in and contribute to the expenses of this suit, and who are interested in the subject-matter thereof, against Henry O. Clark, A. Hyatt Smith, Ira Justin, Junior, Henry B. Benester, Charles Stevens, Almira Clark, Charles J. Hayes, Lafayette Patten, James G. Alden, Charles Richards, and Asahel W. Wheelock, all of the City of Janesville, in the State of Wisconsin, and Ezra Miller, of Magnolia, in the said State of Wisconsin, all citizens of the said State of Wisconsin, defendants; and thereupon your orators state and show unto your honor, that the said defendants, Henry O. Clark, A. Hyatt Smith, and Ira Justin, Junior, on the third day of July, one thousand eight hundred and fifty-four, were, and for a long time previously thereto had been copartners in trade, doing business in the City of Janesville aforesaid, under the name, style, and firm of H. O. Clark & Co.

And your orators further show unto your honor, that the said firm of H. O. Clark & Co., while doing business as aforesaid, became in-

debted to your orators and divers other persons, in sundry considerable sums of money, and particularly to your orators, Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, in a sum of money, amounting, on the said third day of July, to the sum of seven thousand nine hundred and seventy dollars and twenty-five cents; and to your orators, the said Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, in a large sum of money, amounting on the said third day of July, to the sum of one thousand eight hundred and forty-one dollars and ninety-three cents, as near as your orators can now estimate the same, which said amount your orators believe to be the true sum then due as aforesaid.

And your orators further show unto your honor, that on the said third day of July, one thousand eight hundred and fifty-four, the said firm of H. O. Clark & Co. being so indebted to your orators, and to the said divers other persons, the names of all whom your orators do not know, they, the said Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., made and executed under their hands and seals, a certain instrument in writing, between the said Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, parties of the first part, and the said defendant, Charles Stevens, party of the second part, which said instrument, in writing, was executed by the said Henry O. Clark and Ira Justin, Jr., in their own proper hands, under their own seals, and by the said A. Hyatt Smith, by the said Henry O. Clark, who signed and sealed the same for him, and who, your orators are informed and believe, was fully authorized and empowered so to do, by a power of attorney, made and executed under the hand and seal of the said A. Hyatt Smith, and delivered to the said Henry O. Clark, by the said A. Hyatt Smith, and which said instrument in writing was also executed under the hand and seal of the said Charles Stevens.

And your orators further show unto your honor, that in and by the said instrument in writing, it was, after reciting that the said firm of H. O. Clark & Co. was justly indebted in sundry great sums of money, and had become unable to pay and discharge the same with punctuality, and that the said party of the first part were desirous of making a fair and equitable distribution of their property and effects among their creditors, witnessed that the party of the first part to said instrument in writing, in consideration of the premises and one dollar to them in hand paid on that day by the said party of the second part, the receipt whereof was and is therein and thereby acknowledged, had given, granted, sold, transferred, assigned, and set over, and, by the said presents, did give, grant, sell, transfer, assign, and set over to the said Charles Stevens, party of the second part thereto, and to his assigns, vendee and vendees, forever, all the stock in trade of the said party of the first part thereto, then in the store theretofore occupied by them in the City of Janesville, in Wisconsin, and more recently occupied by Ezra Miller, as a clothing store; said stock consisting of clothing and cloths and merchandise, and also

all notes, bills, bonds, mortgages, debts, choses in action and effects of the said copartnership, party of the first part, of whatever kind, nature, or description, together with all books, vouchers, memorandums, and written evidences of said indebtedness; and did give, grant, assign, and set over to the party of the second part, the said Charles Stevens, all the property, moneys, and effects, and stock in trade of the said copartnership, party of the first part, of whatever kind or description, and wherever the same might be, together with all the property, effects, credits, and assets of the said copartnership, party of the first part, be the same more or less; all of the said property and effects so given, granted, sold, assigned, transferred, and set over as aforesaid, were in and by said deed of assignment given, granted, assigned, transferred, and set over, as aforesaid, to the said Charles Stevens, said party of the second part, in trust, and to and for the following express uses, interests, and purposes; that is to say, that the said party of the second part should take the immediate possession of all the property and effects so thereinbefore sold, given, granted, assigned, transferred, and set over, as aforesaid, and immediately sell and convert the same into cash; and also, in the shortest possible time, collect all and singular the debts, dues, demands, bills, bonds, notes, accounts, claims, and choses in action so assigned, sold, given, granted, and set over, as aforesaid, or so much thereof, as could be collected, and thereupon to make and execute all necessary instruments for that purpose, and that by and with the proceeds of said property converted into cash, as aforesaid, and the moneys collected as aforesaid, the said party of the second part should pay all just and reasonable expenses and charges of executing and carrying into effect the said assignment, and by and with the residue, and net proceeds of such sales and collections, the said party of the second part to the said instrument should first pay and discharge, in full, the several debts, bonds, notes, judgments, and sums of money due or to grow due from the said party of the first part, the said firm of copartnership of H. O. Clark & Co., of whatever kind, or for which they, the said party of the first part, were liable to Ezra Miller, of Wisconsin, Sidney Corbit, of New York, Mrs. Almira Clark, of Wisconsin, Sackett, Belcher & Co., of New York, Bowen & McNamee, of New York, the Janesville City Bank, Henry B. Benester, together will all interest due or to grow due thereon, and if said proceeds and avails should not be sufficient to pay the whole debts due, as aforesaid, to said persons therein above first named, as creditors of the party of the first part, said H. O. Clark & Co., then that said proceeds and avails should be distributed pro rata among them all, in proportion to the amounts of their respective claims; and, secondly, by and with the residue and remainder of the said proeeds, if there should be any, that the said party of the second part should pay all the other copartnership debts, demands, and liabilities due or to become due from the said party of the first part, the said firm of H.

O. Clark & Co.; and if the said remainder should be insufficient to pay all of said debts, that then he should pay them, pro rata, share and share alike, according to their respective amounts; and, thirdly, if, after the before-mentioned payments made by the party of the second part, there should be any remainder of said proceeds, that then the said Charles Stevens, said party of the second part, should pay all the individual indebtedness of the members of the said co-partnership of H. O. Clark & Co.; and if such remainder should be insufficient to pay all such individual indebtedness, that then such payment to such individual creditors should be made pro rata, share and share alike; and it was in and by the said instrument further witnessed, that, for the better execution of the said instrument, and the several trusts thereby reposed, the said party of the first part did thereby make and constitute the said party of the second part his executors, administrators, and assigns, them, and each of them, their true and lawful attorney, irrevocable, with full powers and authority to do and perform all acts in their name necessary to the full execution and performance of the trusts therein and thereby reposed.

And your orators further show unto your honor, that they are informed and believe, and so state the fact to be, that there is not now, nor was there at the date of such assignment, any such corporation, body politic, or institution, as the Janesville City Bank, but that the said defendant, Henry B. Benester, then kept his office in a building which he called the Janesville City Bank, and that any debt mentioned and referred to in said assignment as being due to the Janesville City Bank, was in fact due to said Benester in his individual right, and is provided for in the direction to pay the debts and demands due to said Benester.

And your orators further show unto your honor, that immediately upon the execution and delivery of the said deed of assignment by the said Henry O. Clark, A. Hyatt Smith, and Ira Justin, Junior, to the said Charles Stevens, they, the said firm of H. O. Clark & Co., delivered to the said Charles Stevens full and absolute possession and control of the store theretofore and then occupied by them, of the stock in trade therein contained, and of all and singular the goods, wares, and merchandise, bonds, bills, notes, evidences of debt, books of account, moneys, credits, effects, and all property and assets, of every name or nature, and the said Charles Stevens then and there took and held the possession thereof, under and by virtue of the said assignment, and entered upon the execution of the said several trusts in the said deed of assignment declared, set forth, and reposed.

And your orators further show unto your honor, that as they have been informed and believe, he, the said Charles Stevens, remained in possession of said store, and had and held the possession of the said property, so by the said assignment sold and set over to him, under and by virtue of said assignment, as such assignee, selling and dis-

posing of the said goods, wares, merchandise, and property so assigned, and collecting such debts, dues, and demands, as by the said deed of assignment he was directed, and had covenanted and agreed to do, up to about the seventeenth day of August, one thousand eight hundred and fifty four, when the said Henry B. Benester, A. Hyatt Smith, Henry O. Clark, Ira Justin, Junior, Charles J. Hayes, Lafayette Patten, James G. Alden, and Charles Richards, as your orators are informed and believe, entered the said store, where the said goods, wares, and merchandise, and other property, credits, moneys, and effects were, and which was in the possession of the said Charles Stevens, and then and there interrupted the said Charles Stevens in the execution of said trusts created in deed, by the said deed of assignment, and prevented all further sales of the said goods, and all further proceedings by said Stevens, under and by virtue of said deed of assignment, and forbid said Stevens to make any further or other disposition of any of said assigned property, and for the purpose of more effectually hindering and entirely preventing the due and faithful execution of said trusts, in and by the said deed of assignment created and reposed, did, as your orators have been informed and believe, remove all the goods, wares, morchandise, bills, bonds, notes, choses in action, books of account, evidences of debt, and all moneys, and all other property of every kind, then in said store, and which was held by said Stevens as such assignee, under and by virtue of the said assignment, out of the said store, and beyond the care, custody, and control of the said Charles Stevens, and did refuse further to allow or permit the said Charles Stevens to have any access to the same or any part thereof, for any purpose whatever.

And your orators further show unto your honor, that they have been informed and believe, and therefore state the fact to be, that the said Henry B. Benester, A. Hyatt Smith, Henry O. Clark, Ira Justin, Junior, Charles J. Hayes, Lafayette Patten, James G. Alden, and Charles Richards, took said property to the store of the said defendant, Asahel W. Wheelock, who received the same into his said store, where the same now are kept by the said defendants, away from the said Charles Stevens, unless it may be that some part or portion thereof have been removed therefrom to some place unknown to your orators. And your orators, from information and belief, state that the said goods, wares, merchandise, and other property so taken away from said Stevens, is of the value of about twenty thousand dollars.

And your orators further show unto your honor, that on or about the nineteenth day of May, one thousand eight hundred and fifty-four, the said Henry O. Clark, Ira Justin, Junior, and A. Hyatt Smith, by said Henry O. Clark, his attorney, made and executed and delivered to the said Henry B. Benester, a mortgage upon certain personal property, belonging to the said firm of H. O. Clark &

Co., which is described in said mortgage substantially as follows: "All the stock of goods, consisting of clothing, dry goods, cloths, linens, cottons, boots, shoes, hats, caps, fire-safe fixtures, clocks, mirrors, sewing machines, thread, buttons, needles, handkerchiefs, shirts, collars, one sorrel horse, one sorrel mare, and all other goods and chattels whatsoever, now remaining and being in the store at present occupied, and the upper stories thereof, by the said party of the first part, in the City of Janesville," which said mortgage was and is upon the following condition, that is to say, "that if the said party of the firt part shall and does well and truly pay or cause to be paid unto the said party of the second part, his executors, administrators, or assigns, the sum of sixteen thousand dollars, with interest at twelve per cent., on the sixteenth day of November, 1854 (this mortgage is given to secure the payment of money lent to the said firm of H. O. Clark & Co.), then these presents and everything herein contained shall cease and be null and void." Which said mortgage was duly filed in the office of the clerk of the City of Janesville aforesaid, where the same now remains of record, and to which, for greater certainty, your orators pray leave to refer, if it shall be necessary so to do.

And your orators further show unto your honor, that they have been informed and believe, and therefore state the fact to be, that at the time of making the said chattel mortgage, and the delivery thereof, the said Henry B. Benester had not lent to the said firm of H. O. Clark & Co., the sum of sixteen thousand dollars or any other considerable sum of money, for which the said firm of H. O. Clark & Co. were then indebted to him, and that said mortgage was given by said Clark, Justin, and Smith, as aforesaid, when they were in embarrassed circumstances, and while suits were pending and being brought against them by their creditors, whose demands had become due, for the sole and only purpose of creating an apparent incumbrance upon said property, and covering up the same to deter creditors from levying upon the same, and to hinder and delay their creditors, and enable the said H. O. Clark & Co. to sell and dispose of the same for their own use and benefit.

And your orators further show unto your honor, that at the time of making the said mortgage, the said H. O. Clark & Co. had a store of goods in the village of Beloit, in the said County of Rock, which were not included in or covered by said chattel mortgage.

And your orators further show unto your honor, that in some short time after making said chattel mortgage, and not far from the first day of June, one thousand eight hundred and fifty-four, the said firm of H. O. Clark & Co. made a pretended sale of all their goods, wares, and merchandise, kept by them for sale in their mercantile business, to the said defendant, Ezra Miller, who entered into possession thereof, as well the said goods in the store at Beloit as at Janesville, and continued therein, carrying on the business therein in his

own name for the space of about one month, which the said Benester well knew, and which he permitted and suffered without making or preferring any claim or title thereto, by virtue of his chattel mortgage or otherwise.

And your orators further show unto your honor, that at or about the time of making said deed of assignment, the said Ezra Miller retransferred or pretended to resell, to said firm of H. O. Clark & Co., all of the property which he had received from them, which had not been theretofore sold and disposed of by him, and for such goods as had been sold by him, he either paid to them the money received therefor, or delivered to them the demands outstanding when he had made sales on credits, deducting from such sales the current expenses of carrying on the business.

And your orators further show unto your honor, that immediately after the delivery of the said deed of assignment and the said property, by the said H. O. Clark & Co. to the said Charles Stevens, he, the said Stevens, removed the said goods in the said store at Beloit, to Janesville, and placed them in the said store thereat with the goods already therein, which said goods or so much thereof as had not been sold and disposed of by said Stevens, were in the said store on the said seventeenth day of August, one thousand eight hundred and fifty-four, when the said defendants removed said property into said store of said defendant Wheelock, as aforesaid, and were also taken by said defendants, with the other goods and property, by means of which several acts of the said defendants, the said Charles Stevens, such assignee, has been, and is wholly prevented from executing the said assignment, and the several trusts thereby created, and your orators and all other creditors of the said H. O. Clark & Co. have lost the interest, benefit, and advantage which they were entitled to, under and by virtue of the said assignment, and have been deprived of the moneys which they otherwise would and ought to have received from the said Charles Stevens, out of the proceeds of the sales of the said goods, and chattels, and property, and from collections which might and could and ought to have been made from the debts so assigned to said Stevens.

And your orators further show unto your honors, that they have no means whatever of ascertaining what amount of the said debts so assigned are secured by notes, bills, bonds, or other written acknowledgment or promise, what amount rest in account liquidated or unliquidated, nor do they know nor can they state the names of the several persons who are indebted to the said firm of H. O. Clark & Co., nor the amounts due and owing, or to become due and owing from the said several persons who are indebted to said firm. And they state the fact from information and belief to be, that the said Charles Stevens has no inventory or description thereof, but they are informed and believe, and so state the fact to be, that the said defendants have and are possessed of the only evidence in relation thereto

in the said notes, bills, bonds, evidences of debt, and other securities, and books of account, so that the said Charles Stevens cannot proceed to make any collection, on account of any of said debts so due to said firm, and assigned to him as aforesaid.

And your orators further show unto your honor, that they have been informed and believe, and therefore state the fact to be, that there are other persons who are not parties hereto, who are interested in the execution of the several trusts in and by the said deed of assignment created, but whose several and respective names are to your orators unknown. But then your orators are informed and believe, and therefore state the fact to be, that such persons are all residents of and citizens of the State of New York, or citizens of some State, other than the State of Wisconsin, or non-residents of the State of Wisconsin, and therefore out of the jurisdiction of this court.

And your orators further show unto your honor, that they have, since the said goods and other property were so as aforesaid taken and removed to the said store of said Wheelock, by their agents, applied to the said Charles Stevens, and requested him to bring suit for the recovery of said property, or to take some steps, or institute some proceeding, either at law or in equity, in relation to said property, to protect the rights and interests of your orators, and the other persons interested therein under said assignment, in and to the said trust property, which the said Charles Stevens has declined to do, unless your orators will indemnify him against loss or damage, and has neglected so to do, and still declines and neglects to, but suffers and permits the said defendants to have, hold, possess, and retain all of said property, and to control the same, to the great injury of your orators and the other creditors of the firm of H. O. Clark & Co., and to the entire and absolute destruction of their rights in said assigned property; and your orators believe that the said defendants, unless they are restrained by injunction, order, or decree of this honorable Court, will convey and dispose of all said property, and convert the same to their own use. And your orators and others, the creditors of the said H. O. Clark & Co., will lose and be deprived of all rights and profits to which they have or are entitled, under said assignment, in and to said assigned property.

And your orators well hoped that the said Charles Stevens, such assignee, would have procured, under such assignment, and have collected all of said debts, or so much thereof as were collectable, and would have converted the said goods, wares, and merchandise, and other property into money, and would have carried into effect, executed, and fully performed the said assignment, and all and singular the trusts therein and thereby created. And that the said defendants, Henry O. Clark, A. Hyatt Smith, and Ira Justin, Junior, would have suffered and permitted the same to be done, and would, by their own efforts and exertions, have aided the said Stevens therein

to bring the whole business to a speedy and successful end, so that the whole matter could have been settled with the least possible delay, as in equity and good conscience they ought to have done, so that your orators, and all other the creditors of the said H. O. Clark & Co., would have received from said Stevens whatever should be justly due to them. But now so it is, may it please your honor, the said defendants, combining and confederating together, and with divers other persons, at present unknown to your orators, but whose names, when discovered, your orators pray may be herein inserted, and they made parties hereto with proper and apt words to charge them as such how to injure, aggrieve, and oppress your orators, wholly neglect and refuse so to execute the said assignment, or to allow or permit the said goods to be sold and converted into money, or to allow or permit the proceeds thereof to be applied to the payment of your orators' said debts, or any other the debts due from the said H. O. Clark & Co., and in justification thereof, the said confederates, or some of them, as your orators are informed and believe, give out and pretend that the said assignment, so made to the said Charles Stevens, is entirely null and void, sometimes pretending that the said Henry O. Clark and Ira Justin, Junior, had no power to make, and execute, and deliver the same; and that therefore, neither the said Charles Stevens, nor your orators, nor any other the creditors of the said H. O. Clark & Co., have acquired any right or interest in the property thus conveyed by the said assignment and delivered to said Stevens. At other times they, the said confederates, or some of them, give out and pretend that, although they, the said Henry O. Clark and Ira Justin, Junior, had full power to make the said assignment, in the manner and form aforesaid, and could have delivered the said property, credits, and effects of the said copartnership of H. O. Clark & Co. to the said Charles Stevens, to be sold and disposed of and converted into money, and when thus converted into money, to be applied in payment of the debts due from the said H. O. Clark & Co. to your orators and others, the creditors of the said H. O. Clark & Co., in the manner and proportions, and with the preferences in the said deed of assignment provided; yet that, when the said deed of assignment was executed and delivered, the said Henry O. Clark was incapacitated, by reason of drunkenness, from making, executing, and delivering the same, and that, by reason thereof, the said assignment is void from the beginning, and that all the acts of said Stevens, in relation to said assigned property, and done under and by virtue of said assignment, are without authority and void; and that they, the said H. O. Clark & Co., may disavow the said assignment, declare it null and void, and may disregard all the provisions and obligations thereof, and had full right and authority to enter said store and forcibly prevent the said Stevens from proceeding further under said assignment, and to take from his possession all the property then in his hands, as such

assignee, whether consisting of money, goods, wares, and merchandise, or notes, bills, bonds, books of account, or evidences of debts, or credits, or other effects. And at other times, as your orators are informed and believe, they, the said confederates, or some of them, give out and pretend that the said mortgage, so executed by the said Clark, Smith & Justin, was given upon good, valuable, and bona fide consideration, without any intent to defraud creditors, and that said Benester might legally and had full power and authority, by virtue thereof, to take from said store, out of the possession of said Stevens, all the property, goods, and chattels covered thereby or included therein, and that, under said mortgage, he might legally retain the same, notwithstanding the said assignment.

And at other times the said confederates, or some of them, give out and pretend that the said assignment was null and void, and of no effect, and that they, the said H. O. Clark, A. Hyatt Smith, and Ira Justin, Jr., had full right and power to sell and dispose of all the said goods, wares, and merchandise, and other property and effects; and that they did, before the removal of said property from said store, sell and set over to said Henry B. Benester, all and singular the goods, wares, and merchandise then in the said store, and in possession of said Stevens being, which were not already covered by said chattel mortgage, and that therefore they, the said defendants, might lawfully remove said goods, wares, merchandise, and property from said store, and take the same away from the care, custody, and control of the said Stevens; and your orators are informed and believe, and therefore state the fact to be, that the said confederates, when they, so as aforesaid, interfered with the business of said Stevens, and prevented and put an end to all further sales by him and proceeding under said deed of assignment, made and gave out substantially all the foregoing claims and pretences, and under such claims and pretences they took and carried away said property, interfered with and interrupted said Stevens in the execution of the several trusts by the said deed of assignment created, and in his carrying the same into effect. But your orators expressly charge, that, as they are advised and believe, the said Clark and Justin had full power to make, execute, and deliver the said assignment, and to create the said several trusts, and to appoint the said Charles Stevens such assignee as aforesaid, and that under and by virtue of the power thereby vested in him, he had the sole right to the possession of all such assigned property, and could sell and dispose of the same for money, and apply the same to the said several purposes in the said deed of assignment mentioned and declared. And your orators further expressly charge, that the said A. Hyatt Smith was a mere silent or dormant partner with said Clark & Justin, and that said Clark & Justin have at all times had the sole management and control of the property and business of said copartnership, and that said A. Hyatt Smith, for the greater portion of the time since the

formation of such copartnership, has been absent from the State of Wisconsin, taking little or no care of his business in this State, whether of said copartnership or otherwise. And your orators expressly charge, that said Henry O. Clark and Ira ——— were, at the time of executing the said deed of assignment perfectly well qualified to make and execute the same; that, as your orators are informed and believe, all the terms, conditions, and details were arranged by said Clark and Justin, under the advice and direction of their attorneys, by themselves selected and employed some days before the making of the same, and that said Clark was in no way incapacitated by drunkenness, or any other cause, to make, execute, and deliver the said deed of assignment. And your orators further, upon their information and belief, charge the fact to be, that the said H. O. Clark & Co., on the nineteenth day of May, one thousand eight hundred and fifty-four, were not indebted to the said Henry B. Benester in the sum of sixteen thousand dollars, or any other sum of money for money lent, or otherwise, to secure the payment of which, said mortgage was given, but that said mortgage was given and received, and held as a cover for the property of said firm of H. O. Clark & Co., and to create an apparent incumbrance thereon, to deter creditors from levying thereon by execution, and to enable said H. O. Clark & Co. to have and hold the possession of said goods, and dispose of the same for their own use, and hinder and delay their creditors in the collection of their lawful debts and judgments. And your orators, upon information and belief, further charge, that if at the date of said mortgage, the said Benester held or claimed any demand against the said firm of H. O. Clark & Co. for moneys advanced or lent on account of said firm, or on the credit thereof, it was for moneys which had been advanced to or for the sole and exclusive benefit of the said A. Hyatt Smith, which said Benester well knew; and that since the giving of said mortgage, and long before the said seventeenth day of August, one thousand eight hundred and fifty-four, the said A. Hyatt Smith and the said Henry B. Benester accounted together concerning the said sums of money, and divers other moneys, and he, the said A. Hyatt Smith, then and there assumed the payment thereof to said Benester, and then and there gave to the said Benester his individual promise to pay the same, and at the same time secured the payment thereof to said Benester, by mortgage on real property, or in some other way, and which said Benester took and received instead of the promise of the said H. O. Clark & Co. And upon like information and belief they further charge, that if any moneys were at any time advanced by said Benester to said H. O. Clark & Co. as a consideration of said mortgage, the same was immediately, or in some short time, thereafter returned to the said Benester by said H. O. Clark & Co., so that, in truth and in fact, no consideration ever passed from said Benester to said H. O. Clark & Co. therefor. And your orators believe and therefore expressly

charge the fact to be, that shortly before the time when the said defendants so as aforesaid entered into said store and took therefrom said property, they, the said Henry B. Benester, A. Hyatt Smith, Henry O. Clark, and Ira Justin, Jr., consulted together in relation to the removal of said goods and property, and then and there fraudulently conspired together with each other, and with the other defendants, or some of them, to take with them sufficient force to enter the said store, and take and remove said property by force if necessary from said store, and from possession of said Stevens, using said chattel-mortgage as a pretence or cover for their action, well knowing at the time that said mortgage was fraudulent as to creditors and utterly null and void for any and every purpose, and that it did not cover any of said goods, and that it did not cover any of said notes, bills, bonds, books of account, or other evidences of debt; and your orators believe and therefore charge the fact to be, that the said Benester permitted himself to be used as the mere tool of said Smith, Clark & Justin, to enable them to get the said property into their possession, so that they could sell and dispose of the same for their own benefit, and cheat and defraud your orators and other creditors of H. O. Clark & Co. out of their just debts, and particularly out of their several and respective shares and proportions of the said assigned property, or the moneys realized therefrom. All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators.

In tender consideration whereof, and forasmuch as your orators are remediless at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this and a similar nature are properly cognizable and relieveable. To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make, not only according to the best and utmost of their several and respective knowledge, but also according to the best and utmost of their several and respective information, remembrance, and belief, full, true, direct, and perfect answer make, to all and singular the matters and things hereinbefore stated, set forth, and charged, and that as fully and particularly as if the same were here again repeated paragraph by paragraph, and they thereunto particularly interrogated, and that they particularly answer, set forth, and state,

1. Whether the said defendants, Henry O. Clark, Ira Justin, Junior, and A. Hyatt Smith, were not, on the third day of July, one thousand eight hundred and fifty four, copartners in trade, doing business at Janesville, in the State of Wisconsin, under the name, style, and firm of H. O. Clark & Co.? How long had they then been doing business under that name, and what was the business by them transacted and carried on?

2d. Whether in such business they, the said H. O. Clark & Co., did not become indebted to divers and sundry persons to a large amount, and particularly to your orators? And whether on the third day of July, one thousand eight hundred and fifty-four, they were not indebted and did not owe to your orators the sums of money hereinbefore stated? If not, what sums did they owe to each of the said firms of Bowen & McNamee, and Sackett, Belcher & Co.? How is or was the same then evidenced?

3d. Whether they, the said firm of H. O. Clark & Co., did not, on the said third day of July, one thousand eight hundred and fifty-four, or at some other and what time, make an assignment of all their goods, wares, and merchandise, bills, bonds, notes, credits, and effects, and all their property and assets, of every name or nature, to the said Charles Stevens for the benefit of creditors, or how otherwise? Was not said assignment made and executed by the said Henry O. Clark and Ira Justin, Junior, personally, and by the said A. Hyatt Smith, by the said Henry O. Clark, or how otherwise? Was not the said Henry O. Clark duly authorized and empowered so to do by power of attorney, made, executed, and delivered to said Clark by said A. Hyatt Smith? Had not the said A. Hyatt Smith before that time made, nominated, constituted, and appointed the said Clark his attorney, with full power and authority among other things to sell and dispose of all or any of his, the said Smith's, personal property and choses in action, or with some and what power? Had not the said A. Hyatt Smith before that time made and executed, under his hand and seal, some power of attorney by which he had conferred upon said Clark such power, or some other and what power? If any such, or any other power of attorney had been made and executed by said Smith, set the same out in its letters and figures?

4th. Whether the said assignment so made and executed was not of the tenor and effect, or of some other and what tenor and effect, hereinbefore stated and set forth? Whether the sale and transfer of said goods and property was, and is not upon trusts and conditions hereinbefore set forth, or upon some such or some other, and upon what conditions and trusts?

5th. Whether the said H. O. Clark & Co. did not immediately, or at some other and what time, after the making and delivery of said deed of assignment, deliver to the said Charles Stevens full possession of the said store then occupied by them, in the said City of Janesville, together with all and singular the goods, wares, merchandise, and chattels, bills, bonds, notes, securities, evidences of debt, books of account, moneys, credits, effects, and all property and assets of the said copartnership, of whatever name or nature, and wheresoever the same were, which belonged to said firm or copartnership? Of what did the said property consist? what was the particular value thereof? or if any of said property or assets of said copartnership was withheld from said Stevens and not delivered? How much in value? What was the nature, kind, quality, and description? Where was

the same, and each and every part and parcel thereof? Who has had the possession thereof since that time? Where is the same now, and each and every parcel thereof? or, if there has been any sale, assignment, or transfer thereof, or of any part thereof, or if there has been any change in the kind, quality, or description or nature thereof, or any part thereof, what? Where are the proceeds thereof, and each and every part thereof? and where is the property for which the same or any part thereof has been exchanged, or into which the same or any part thereof has been converted?

6th. Whether the said Charles Stevens did not have and hold the possession of the said property and assets, or of some and what part, under the said assignment, and did not enter upon the execution of said trusts, in and by said deed of assignment created and reposed, according to the true intent and meaning thereof, or how otherwise?

7th. Whether the said Charles Stevens did not have and hold the possession of the said property and effects so as aforesaid sold, assigned, and set over to him in and by the said deed of assignment as such assignee thereof, selling and disposing of the said goods, wares, and merchandise, and converting the same into money, and collecting the debts so assigned, as is hereinbefore stated and set forth, or how otherwise?

8th. Whether he, the said Charles Stevens, did not so continue in possession of said store at Janesville, selling and disposing of said property, and converting the same into money, until about the seventeenth day of August, one thousand eight hundred and fifty-four, or until some other and what time, with the full knowledge, consent, and approbation of the said H. O. Clark & Co., or how otherwise?

9th. Whether, on or about the said seventeenth day of August, or on some other and what day, the said defendants hereinbefore stated, to wit, A. Hyatt Smith, Henry O. Clark, Ira Justin, Junior, Henry B. Benester, Lafayette Patten, James G. Alden, Charles J. Hayes, and Charles Richards, or some one or more, and which of them, did not enter the said store of the said Charles Stevens, where the said goods, wares, merchandise, and other property were, and whether they did not then and there in some way or manner, and in what, interfere with and interrupt the said business of the said Charles Stevens there, and hinder and entirely prevent him from further proceedings therein, and whether they did not by some means and by what, entirely prevent any further sales of said property so assigned to said Stevens, and did compel the said Charles Stevens to cease any and all further proceedings in relation to said property, under the said deed of assignment, or how otherwise? And whether the said defendants did not then and there forcibly remove the said goods, wares, and merchandise, and notes, bills, bonds, evidences of debt, and all other property and assets then in the said store being, or some and what part thereof, out of said store, and take and carry the same, or some and what part thereof, to the said store

of said Wheelock, away from the care, custody, and control of said Charles Stevens and beyond his reach, and whether said Wheelock did not then and there receive the same, and whether they did not then and there refuse to allow or permit the said Charles Stevens longer to have or retain the possession of said property or any part thereof, or to proceed further in the execution of the trusts in and by said deed of assignment created, or to have any further or other control over said property or any part thereof, or make any disposition thereof, or any part thereof?

9th. Whether the said property, goods, wares, merchandise, notes, bills, bonds, securities, evidences of debt, and assets, so as aforesaid taken and removed out of said store, are not now in the said store of said Wheelock, in the possession of said defendants; or if any part thereof has been taken therefrom, what part, of what did it consist, who took the same away, where was it taken to, and where is the same now? What part thereof now remains in said store, of what does it consist, and what is the particular value thereof? What were the particular kind of books of account taken from said store? Designate each particularly. Are they in your possession, or if not in your possession, where are they now, each and every of them? State fully and particularly.

10th. That said defendants may also state and set forth fully and particularly the several kinds, qualities, and descriptions of the said goods, wares, and merchandise, and the value thereof specifically, and also the amount of such debts; whether the same are secured by note, bill, bond, or other evidence in writing, or written promises, or whether the same rests in account, liquidated or unliquidated, setting forth the date of each note, bill, bond, or other security, with the amount due or to become due thereon, the time when the same will become due, or became due, the names of the makers, drawers, and indorsers thereof respectively, and the rate of interest they and each of them draw, or are upon, and from what time the same began to run, also setting forth the name of each person or firm against whom any account was outstanding at the time of such assignment; the amount owing by each, the date of the commencement of such account; whether the same is upon interest or how otherwise, giving a full statement of the different kinds of property for which said account accrued; stating generally whether the same accrued for money, and to what amount, or for goods, wares, and merchandise; stating the amount of money and of goods, wares, and merchandise composing the same separately, but giving the items thereof, where the same now are, and if there have been any sales, assignment, transfers, or other disposition of any of said property? whether goods, wares, merchandise what? to whom were they made, for what consideration, upon what terms and conditions, and what has been done with the proceeds of the same, and each and every part thereof, and where is said property now? State and set forth fully and at

large if any collection have been made of any of said debts, what debts, from whom, what amount, by whom, where is the money collected, or what has been done with it and every part thereof? State and set forth the number and names of each book, and the use for which it was kept.

11th. Whether the said Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, did not, on or about the nineteenth day of May, one thousand eight hundred and fifty-four, or at some other and what time, did not make, execute, and deliver to said Henry B. Benester such chattel-mortgage as is hereinbefore stated; or some other and what, upon the property hereinbefore mentioned and set forth, or upon some other, and what; and whether the said mortgage was not upon the condition in this bill of complaint stated and set forth, or upon some other and what condition? And whether, at the time of giving the said mortgage, the said Henry O. Clark & Co. were indebted to the said Henry B. Benester in the sum of sixteen thousand dollars for money lent and advanced by him to them, or in any other, and what sum? when was the same advanced, for what purpose, in what sums, upon what securities? What was done by the said H. O. Clark & Co. with the money thus advanced? Was it used by them in payment of any of the debts of such copartnership? If so, what debts? what amount, was thus applied? and what has been done with the remainder, if any? where is the same or any part thereof now? Was not the whole, or some part thereof, and what part, advanced for the sole and exclusive benefit of the said A. Hyatt Smith? and has he not since that time taken the payment of the whole thereof upon himself, and given his individual security therefor, which is now held by the said Henry B. Benester? and is not the same full, ample, and unquestionable for the payment thereof to said Benester? Was not said mortgage given, and is it not held by said Benester, without any consideration whatever? and was it not intended to be used as a mere cover for the property of said firm, and to hinder, delay, and defraud creditors of their just and lawful debts, suits, and judgments? or, if it was founded upon any consideration, what? from whom did it proceed? If any moneys were lent and advanced by said Benester to said H. O. Clark & Co., as a consideration for said mortgage at the time of giving the same, how much? When was it advanced? Was it not upon the understanding and agreement, that the same should be repaid to said Benester forthwith, or in some short time? and was not the whole, or some part thereof, and what part, immediately, or in a short time after, repaid by said H. O. Clark & Co. to said Benester? Has not the said mortgage been held by said Benester for a long time, and how long, with the understanding and agreement between the said H. O. Clark & Co., that he should release and discharge and cancel the same, whenever the said H. O. Clark & Co. should direct or request?

12th. Did not the said H. O. Clark & Co., some time about the 1st of June, 1854, and subsequent to the date of said chattel-mortgage to said Benester, make a pretended sale of all, or some part, and what part, of their property and effects, to the said defendant, Ezra Miller? What was the consideration for such sale? when was it made? Was it not made with a view to prevent the creditors of said H. O. Clark & Co., who were then about to obtain judgment against them, from levying upon the said goods, wares, and merchandise? Did not the sale to said Miller include all goods in store at Beloit as well as at Janesville, as is hereinbefore stated, or how otherwise? Did not said Miller take possession of said stores and goods and other property so pretended to be purchased by him, and carry on the same business which had been heretofore carried on by said H. O. Clark & Co. for some time, and how long? and was not the fact well known to the said Benester?

13th. Did not said Miller, at or about the date of the said deed of assignment to said Charles Stevens, resell all of said property, or some part thereof, and what, to said H. O. Clark & Co., accounting at the same time for all goods sold by him, whether for money or on credits, or how otherwise?

14th. Whether they, the said A. Hyatt Smith, Henry O. Clark, Ira Justin, Jr., and Henry B. Benester, did not, shortly before the taking and removing said goods and other property, and when, consult and conspire together for the purpose of interrupting said Charles Stevens in the prosecution of his business in said store, and preventing him from making sale of said property, and of taking all and every part thereof from his possession? and whether it was not by and between them, thus conspiring, agreed, that said Benester should make use of said chattel-mortgage for the purpose of taking said property from the possession of said Stevens, and placing it in the possession of said H. O. Clark & Co., and thereby wholly defeat the rights of your orators, and the other creditors of said H. O. Clark & Co. in and to said assigned property, or how otherwise?

15th. Whether the said defendants, in justification of their acts, have not again given out and pretended, that said assignment was null and void, that said mortgage to said Benester was valid and effectual, and whether at the time of taking and removing the said goods and property, they or some of them did not give out and pretend, that said Henry B. Benester had purchased from said H. O. Clark & Co., all of the said stock of goods and other property, or some, and what part thereof, which was not included in and covered by said chattel-mortgage, and whether the said goods and chattels, and other property, was not taken by the said defendants under the claims and pretences hereinbefore stated and set forth, or under some such and what claim or pretence? And that all the said defendants, except the said Charles Stevens, by injunction, issuing out of and

under the seal of this honorable court, may be perpetually enjoined and restrained from selling or disposing of, or using, or in any way or manner interfering or intermeddling with any of said goods, wares, and merchandise, and personal property, so assigned to the said Charles Stevens, or so as aforesaid taken by said defendants, from the possession of the said Charles Stevens, or if any sales or transfers thereof, or any part thereof, have been already made by said defendants, or either or any of them, that they may in like manner be restrained and enjoined from using, disbursing, paying out, disposing of, or in any way or manner interfering or intermeddling with any moneys received therefor, or any securities taken for, or debts or dues created by such sales or transfers thereof; and that they may in like manner be enjoined and restrained from selling, assigning, transferring, negotiating, collecting, or using, or in any way or manner interfering or intermeddling with any of said notes, bills, bonds, securities, evidences of debt, choses in action, or books of account, or book accounts, or debts due or to become due, which were in and by the said deed of assignment sold, assigned, transferred, and set over to the said Charles Stevens, or which were taken by said defendants from said store, and from the possession of the said Charles Stevens, as aforesaid, and from using, paying out, disposing of, or in any way or manner interfering therewith, and that they may in like manner be restrained and enjoined from paying out, using, disbursing, or intermeddling with any of the money, or other property, credits, effects, or assets, of the said firm of H. O. Clark & Co., which they had on said third day of July, 1854, and which were by said deed of assignment sold, assigned, transferred, and set over or intended to be, unto the said Charles Stevens, or which was taken from said store, from the possession of said Charles Stevens, as aforesaid, or from doing anything with any of said property, or from doing any act in relation thereto or any part thereof, and that the said deed of assignment may, by a decree of this honorable Court, be declared to have been legally and properly executed by all the parties thereto, and to be binding and obligatory upon them, and that the same may, by a decree of this Court, be declared legal, valid, and effectual in the law, to pass the title of, in, and to all the property therein mentioned and referred to, or intended to be mentioned and referred to, to the said Charles Stevens in trust, nevertheless, for the uses and purposes therein expressed and declared, and that some discreet person may, by an order of this honorable Court, be appointed a receiver in this cause, to take possession of said property during the pendency of this suit, and hold or dispose of the same, and collect said debts or otherwise, as by this honorable Court shall be ordered or directed, with such powers as this honorable Court shall see fit to give, or that the said defendants, who shall have said property in their possession or any part thereof, or said notes, bills, bonds, evidences of debt, securities, choses in action, or books of account, or any or

either of them, or any part thereof, may by a decree of this honorable Court be directed, required, and compelled, to deliver into the hands of said Charles Stevens, all of such property, notes, bills, bonds, choses in action, evidences of debt, books of account, or so much thereof as now remain in their hands, so that said Stevens may proceed under the direction of this honorable Court to carry into effect and execute the said several trusts in and by the said deed of assignment created and declared; or if any of the said defendants except said Stevens, have made any sales or disposition or transfer of any of said property, that said defendants other than said Stevens may be decreed to pay, either to the said Stevens or into this honorable Court, the full value thereof, to be divided and distributed to and among the several persons interested therein, under and by virtue of said deed of assignment, in the order and upon the preferences in the said deed of assignment provided and declared. And that the said defendants may account for all or any part of said assigned property, whether delivered to said Charles Stevens or not, and for all and every part of so much of said property as was in said store at Janesville, on said seventeenth day of August, 1854, at the time the said property was taken to the store of said Wheelock, as aforesaid, whether the same be now in their or either of their hands and possession, or which is under their or either of their control, or if sold or disposed of, for the proceeds and avails thereof. And that the said several trusts, in and by the said deed of assignment created and declared, may be executed, performed, and carried into effect, under the direction of this honorable Court, and that the rights of your orators and all other persons interested in and to said assigned property, or the proceeds and avails thereof when converted into money, may be judicially determined and declared by the decree or order of this honorable Court, and that all persons interested who are not made parties to this suit, or whose names are unknown to your orators, or who are residents in and citizens of the State of New York, or who are not residents or citizens of the State of Wisconsin, may, upon their names being discovered, or upon coming within the jurisdiction of this honorable Court, be made parties complainant or parties defendant to this bill of complaint, as shall be proper and according to law, and the rules and practice of this honorable Court; and that the said chattel-mortgage so given by said Henry O. Clark, Ira Justin, Junior, and A. Hyatt Smith, to the said Henry B. Benester, may be declared fraudulent and void, as to the creditors of said firm of H. O. Clark & Co., and may be directed to be given up and cancelled; or if it shall appear that it was given for any valid purpose based upon any bona fide consideration, that then it may be declared to have been paid and satisfied in full, and to be void and of no effect, and be decreed to be given and cancelled, so that the apparent incumbrance upon the property therein described may be removed, and so that the said mortgage cannot again be used

by said Benester, or any other person, as a fraudulent pretence for interfering or intermeddling in any way or manner with any of said assigned property. And that your orators may have such, or such further relief in the premises as the nature of the case shall require, or as shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orators, not only the writ of injunction issuing out of and under the seal of this honorable Court, to be directed to the said defendants, their attorneys, counsellors, solicitors, servants, or agents, strictly restraining and enjoining them, and each and every of them, except the said Charles Stevens, from selling or disposing of, or using, or in any way or manner interfering or intermeddling with any of said goods, wares, and merchandise, and personal property, so assigned to the said Charles Stevens, or so as aforesaid taken from the possession of the said Charles Stevens, or if any sales or transfers thereof, or any part thereof, have been already made by said defendants, or either or any of them, from using, disbursing, paying out, disposing of, or in any way or manner interfering or intermeddling with any moneys received therefor, or any securities taken for, or debts or dues created by such sales or transfer therefor; and also from selling, assigning, transferring, negotiating, collecting, or using, or in any way or manner interfering or intermeddling with any of said notes, bills, bonds, securities, evidences of debt, choses in action, or books of account, or book of accounts, or debts due, or to become due, which were in and by the said deed of assignment sold, assigned, transferred, and set over to the said Charles Stevens, or which were taken by said defendants from said store, and from the possession of said Charles Stevens, as aforesaid, and from using, paying out, disposing of, or in any way or manner interfering therewith; and from paying out, using, disposing of, or intermeddling with any of the money or other property, credits, effects, or assets of the said firm of H. O. Clark & Co., which they had on the said third day of July, 1854, and which were, by said deed of assignment, sold, assigned, transferred and set over, or intended to be, unto the said Charles Stevens, or which was taken from the said store, and from the possession of the said Charles Stevens, and from doing anything with any of said property, or from doing any act in relation thereto, or any part thereof, but also the writ of subpœna issuing out of and under the seal of this honorable Court, to be directed to the said Henry O. Clark, A. Hyatt Smith, Ira Justin, Junior, Henry B. Benester, Charles Stevens, Almira Clark, Charles J. Hayes, Lafayette Patten, James G. Alden, Charles Richards, Asahel W. Wheelock, and Ezra Miller, therein and thereby commanding them, and each of them, on a day certain, and under a certain penalty, to be therein inserted, that they personally be and appear in this honorable Court, before the Judge thereof, then and there to answer the premises, and

further to stand to and abide by and perform such order or decree therein, as shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

HENRY C. BOWEN,
THEODORE McNAMEE,
SAMUEL P. HOLMES,
HENRY L. STONE,
By ANTHONY GILKISON.
AMOS SACKETT,
WM. BELCHER,
RALPH SACKETT,
HENRY BELCHER,
By E. L. DIMOCK.

J. A. SLEEPER,
Solicitor for Complainants.
FINCH & LYNDE,
Of Counsel for do.

NOTE.—The said defendants, A. Hyatt Smith, Henry O. Clark, Ira Justin, Junior, Henry B. Benester, Lafayette Patten, Charles J. Hayes, Charles Richards, Almira Clark, Asahel W. Wheelock, and Ezra Miller, are each required to answer the interrogatories, numbered consecutively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

The said defendant, Charles Stevens and James G. Alden, is required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 15.

United States of America, District of Wisconsin, *ss.*

Anthony Gilkison, of the City and County of New York, being duly sworn, says, that he is the agent of the said complainants, Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, duly authorized by them, that as such agent he has subscribed their names to the foregoing bill of complaint, and he saith that he has heard the said bill of complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be upon the information and belief of the said complainants, and as to those matters, he believes it to be true. And he saith, that he has personal knowledge of the amount due to the said complainants, Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone. And he saith, that he hath personal knowledge of the sale, or pretended sale, to said Ezra Miller, stated in said bill, of the making of said assignment, the delivery thereof to said Stevens, and the delivery of said assigned property to him under the said assignment, and of the fact that said Stevens took possession thereof, and entered upon the execution of the trusts created in and by said assignment. And he saith, that before

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the time of making said assignment, and some time in the month of June, 1854, he was informed by said H. O. Clark that said chattel-mortgage to said Benester was of no avail, amounted to nothing, and could and would be released at any moment, upon his applying to said Benester so to do. And he saith, that he did himself, after the making and delivery of said assignment, apply to the said Benester and request him to release and discharge said mortgage, at the same time informing him that said assignment had been made, and what the said Clark had told this deponent. Whereupon said Benester stated to this deponent that he did not know as H. O. Clark & Co. owed him a cent; that he could not, however, release any papers without seeing said Clark, but that one word from Mr. Clark would release said chattel-mortgage at once. And he saith, that as the agent of said firm of Bowen & McNamee, he has employed and directed Joseph A. Sleeper, the solicitor for said complainants, to file the foregoing bill of complaint on their behalf, and said Sleeper is fully authorized so to do.

ANTHONY GILKISON.

Subscribed and sworn before me, this 29th day of August, A. D. 1854.

GEO. S. DODGE,
U. S. Commissioner.

United States of America, District of Wisconsin, *ss.*

Ensign H. Bennett, of the City of Janesville, in said district, being duly sworn, says, that he has heard read the foregoing bill of complaint, and knows the contents thereof. That he knows, of his own knowledge, that said Charles Stevens entered into said store, in Janesville, and took possession of said property, under and by virtue of the assignment mentioned and set forth in said bill of complaint; that he entered upon the execution of the trusts therein and thereby created, and was in possession of said store, and goods, and assigned property, selling and disposing of said goods, and collecting the debts therein mentioned, until about the seventeenth day of August, 1854, and that then the said goods and other property were forcibly taken from said Stevens, and out of said store, to the store of said Wheelock, who was then in his store, and that the statements in the said bill of complaint, in relation to those facts, are substantially true.

ENSIGN H. BENNETT.

Subscribed and sworn before me, this 29th day of August, A. D. 1854.

GEO. S. DODGE,
U. S. Commissioner.

United States of America, District of Wisconsin, *ss.*

Edward L. Dimock, of the City of Janesville, in said district,

being duly sworn, says that he is the agent of the complainants in the foregoing bill, composing the firm of Sackett, Belcher & Co., in relation to the debt due to them, stated in said bill of complaint, that he has subscribed their names to such bill of complaint, as their agent, and that he has employed Joseph A. Sleeper, solicitor for complainants, to bring said bill of complaint on their behalf; and he says that he has calculated the interest, damage, and exchange upon the demand due Sackett, Belcher & Co. from said H. O. Clark & Co., and that the sum stated and set forth in said bill of complaint, as being due thereon, on the third day of July last, is correct.

E. L. DIMOCK.

Sworn and subscribed before me, this 29th day of August, A. D. 1854.

GEO. S. DODGE,
U. S. Commissioner.

Answer of Clark.

In the District Court of the United States for the District of Wisconsin. In Equity.

The answer of Henry O. Clark, one of the defendants to the bill of complaint of Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone; and Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, complainants.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception, which can or may be had, or taken to the many errors and uncertainties and other imperfections in the said complainants' said bill of complaint, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant answering saith:

That this defendant, A. Hyatt Smith, and Ira Justin, Jr., were not, on the third day of July, one thousand eight hundred and fifty-four, copartners in trade, doing business at Janesville, in the State of Wisconsin, under the name, style, and firm of H. O. Clark & Co., and that this defendant, and the said Smith and Justin, never have been copartners in trade, doing business under such name, style, or firm, or under any other name, style, or firm, at Janesville, or any other place. But this defendant admits, that this defendant and A. Hyatt Smith were, on the said third day of July, A. D. 1854, copartners in trade, doing business at Janesville, Wisconsin, under the name, style, and firm of H. O. Clark & Co.; that they had been copartners, doing business under that name, style, and firm, for the term of eighteen months or thereabouts; that the business transacted by them was buying, making, and selling ready-made clothing, and buying and selling vestings, cloths, cassimeres, and keeping a furnishing store for gentlemen; that when this defendant and the

said Smith first commenced doing their said business as aforesaid, the said defendant, Ira Justin, was engaged in the capacity of clerk, upon the following terms: he was at his election to have one-fifth of the net profits of the business done by said H. O. Clark & Co., or five hundred dollars a year and his expenses of board, lodging, and washing, as a compensation for his services, but was not to sustain the losses of said firm, or be liable for their debts; and said Justin had, prior to the said third day of July, A. D. 1854, made his election to take said sum of five hundred dollars a year, with his said expenses, &c.

And this defendant, further answering, says, that he admits that the said firm of H. O. Clark & Co., in the said business, did become indebted to divers and sundry persons to a large amount, and that they did, in such business, become indebted to the said firm of Bowen & McNanee, mentioned in said bill of complaint, as well as the said firm of Sackett, Belcher & Co., also in said bill mentioned. That on the third day of July, A.D. 1854, the said firm of H. O. Clark & Co. were indebted to the said firm of Bowen & McNamee, in the sum of seven thousand nine hundred and fifty dollars, or thereabouts; but of that sum there was only about two thousand dollars then due; that the residue became due as follows: about one thousand dollars on the 30th of July, A.D. 1854; about one thousand dollars on the 30th day of August, 1854; two thousand and sixteen dollars on the 30th day of October, A.D. 1854, and the remainder on the 30th day of December, A.D. 1854.

That on the said third day of July, 1854, the said firm of H. O. Clark & Co. were indebted to William Belcher, Henry Belcher, and Ralph Sackett, in the sum of about one thousand eight hundred and thirty-four dollars and ninety-three cents; that the demands of the said firm of Bowen & McNamee, prior to the third day of July, 1854, was evidenced by the notes of the said firm of H. O. Clark & Co.; but on that day if judgment by confession was entered for said demand in the Circuit Court for Rock County, which judgment has since been vacated as to A. Hyatt Smith, for the reason that he did not execute the warrant of attorney by virtue of which the said judgment was entered.

That the demand of the said firm of Sackett, Belcher & Co., on said third day of July, A.D. 1854, was evidenced by books of account, and by the acceptance by the firm of H. O. Clark & Co. of the draft of the said firm of Sackett, Belcher & Co. for the amount of their demand.

This defendant further says, that the debts and liabilities of his said firm, aside from those to said complainants, amounts to about forty thousand and two hundred dollars.

And this defendant, further answering, says, that he is informed and believes that, on the third day of July, A.D. 1854, this defendant signed and delivered to Charles Stevens, one of the defendants in the

said complainants' bill mentioned, a certain indenture of assignment, which is in the words and figures following, to wit:

This indenture, made and entered into, at Janesville, Wisconsin, this third day of July, A.D. 1854, by and between Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, under the name, style, and firm of H. O. Clark & Co., party of the first part, and Charles Stevens, of said Janesville, party of the second part, witnesseth:

Whereas the said copartnership party of the first part is justly indebted in sundry great sums of money, and has become unable to pay and discharge the same with punctuality, and the said party of the first part are desirous of making a fair and equitable distribution of their property and effects among their creditors.

Now therefore this indenture witnesses, that the party of the first part, in consideration of the premises and one dollar to them in hand paid, this day, by the said party of the second part, the receipt whereof is hereby acknowledged, have given, granted, sold, transferred, assigned, and set over, and by these presents do hereby give, grant, sell, transfer, assign, and set over to the said party of the second part, and to his assigns and vendee or vendees forever, all the stock in trade of the said party of the first part, now in the store heretofore occupied by the party of the first part, in the City of Janesville, in Wisconsin, and more recently occupied by Ezra Miller, as a clothing store. Said stock consists of clothing and cloths and merchandise; and also all notes, bills, bonds, mortgages, debts, choses in action, and effects of the said copartnership, party of the first part, of whatever kind, nature, or description, together with all books, vouchers, memoranda, and written evidences of said indebtedness, and do give, grant, and assign and set over to the party of the second part, all the property, moneys, and effects and stock in trade of the said copartnership, party of the first part, of whatever kind or description, and wherever the same may be, together with all the property, effects, credits, and assets of the said copartnership, party of the first part, be the same more or less.

All of said property and effects so given, granted, sold, assigned, transferred, and set over as aforesaid, are given, granted, assigned, transferred, and set over as aforesaid, to the said party of the second part, in trust, and to and for the following express uses, intents, and purposes, that is to say, that the said party of the second part shall take immediate possession of all the property and effects so hereinbefore sold, given, granted, assigned, transferred, and set over as aforesaid, and immediately sell and convert the same into cash; and also in the shortest possible time collect all and singular the debts, dues, demands, bills, bonds, notes, accounts, claims, and choses in action, so assigned, sold, given, granted, and set over as aforesaid, or so much thereof as can be collected, and thereupon to make and execute all necessary instruments for that purpose, and by and with the proceeds of said property converted into cash as aforesaid, and

the moneys collected as aforesaid, the said party of the second part shall pay all just and reasonable expenses and charges of executing and carrying into effect this assignment, and by and with the residue or net proceeds of such sales and collections, the said party of the second part shall,

First. Pay and discharge, in full, the several and respective debts, bonds, notes, "judgments," and sums of money due, or to grow due, from the said parties of the first part, of whatever kind or for which the party of the first part is legally liable, to Sidney Corbett, of New York, Ezra Miller, of Wisconsin, Sackett, Belcher & Co., of New York, Mrs. Almira Clark, of Wisconsin, Bowen & McNamee, of New York, the Janesville City Bank, H. B. Benester, together with all interest due, or to grow due, thereon; and if said proceeds and avails shall not be sufficient to pay the whole debts due, as aforesaid, to said persons above first named, as creditors of the party of the first part, then said proceeds and avails shall be distributed, pro rata, among them all, in proportion to the amounts of their respective claims.

Secondly. By and with the residue and remainder of the said proceeds, if there shall be any, the party of the second part shall pay all the other copartnership debts, demands, and liabilities, due or to become due from the party of the first part; and, if said remainder is insufficient to pay all of said debts, then he shall pay them, pro rata, share and share alike, according to their respective amounts.

Thirdly. If after these before-mentioned payments, made by the party of the second part, there shall be any remainder of said proceeds, then he the said party of the second part shall pay all the individual indebtedness from the members of the copartnership, party of the first part; and if such remainder is insufficient to pay all, then such payments to such individual creditors shall be made pro rata, share and share alike.

And for the better execution of these presents and the several trusts hereby reposed, the said parties of the first part do hereby make and constitute the said party of the second part, his executors, administrators, and assigns, their and each of their true and lawful attorney, irrevocable, with full power and authority to do and perform all the acts in their name necessary to the full execution and performance of the trusts herein and hereby reposed.

In witness whereof, the parties of the first part have hereunto set their hands and seals, at Janesville, in Wisconsin, this 3d day of July, A. D. 1854.

H. O. CLARK. [SEAL.]
IRA JUSTIN, JR. [SEAL.]
A. HYATT SMITH, [SEAL.]
By H. O. CLARK,
His partner.
H. O. CLARK & CO.
CHARLES STEVENS. [SEAL.]

In presence of
MAT. H. STEVENSON,
CHAS. S. JORDAN,
A. GILKISON.

That this defendant is also informed and believes, that the said defendant, Ira Justin, Jr., also signed and sealed the said indenture of assignment.

This defendant is also informed and believes, that he not only put his own hand and seal to the said indenture of assignment, but also that of the firm of H. O. Clark & Co.; and he is also informed and believes, that he signed the said indenture of assignment with the name of A. Hyatt Smith, as his partner, as it appears to be signed in the copy thereof above set forth.

This defendant further says, that he was not present when the said indenture of assignment was being drawn, that he has no recollection of signing his own name, the name of his said firm, or the name of the said A. Hyatt Smith, to the same; and that he has no recollection of delivering the said indenture of assignment to the said Charles Stevens.

That, before the time of making and executing the said indenture of assignment, as above mentioned, this defendant had been requested and urged by one Anthony Gilkison, who, as this defendant is informed and believes, was the agent or runner of the said firm of Bowen & McNamee, to make an assignment, and this defendant had partially consented so to do. But this defendant says, that the assignment, which he had partially consented to make, was not like the one above set forth; but it was to be one in which the creditors, who are preferred in the said assignment above set forth, were to be preferred in the order in which their names are mentioned in the indenture of assignment above set forth, that is to say, Ezra Miller, of Wisconsin, was first to be paid the full amount of his claims; Mrs. Almira Clark, of Wisconsin, was next to be paid the full amount of her claim or demand; the Janesville City Bank, Henry B. Benester, was next to be paid the full amount due it or him; and so on to Bowen & McNamee, who were to be the last class of preferred creditors. And this defendant positively denies, that he ever agreed or intended to make an assignment in which the creditors who are preferred by the said indenture of assignment above set forth, were to be paid, share and share alike.

This defendant further says, that, at the time he executed the assignment above set forth, he was intoxicated to that degree, by the use of spirituous liquors, as to be incapable of comprehending the nature of said assignment; and that he was entirely incapacitated to understand ordinary business transactions.

This defendant further says, that he is informed and verily believes that his said intoxication was intentionally brought about through the

agency of the said Anthony Gilkison, with the design, on Gilkison's part, of procuring this defendant to make said assignment. This defendant further says, that he did not understand the provisions of the said indenture of assignment above set forth, until about ten days after the same was executed, when he was informed what they were by Henry B. Benester. This defendant further says, that after he learned the nature of said assignment, he never assented to or ratified the same.

This defendant further says, that he is informed and believes that Ira Justin executed the said indenture of assignment personally, at this defendant's request, he having no personal interest in the matter whatever. This defendant further says, that he was never duly authorized and empowered by the said defendant, A. Hyatt Smith, by power of attorney, or in any other manner, to make said assignment or any assignment whatever of the partnership property and effects of said firm of H. O. Clark & Co.

That, at the time of the execution of said assignment, this defendant had a power of attorney from said A. Hyatt Smith, which was duly executed and acknowledged by said Smith, and is in the words and figures following, viz.:

"Know all men by these presents, that I, A. Hyatt Smith, of the City of Janesville, in the County of Rock, and State of Wisconsin, do hereby nominate, constitute, and appoint Henry O. Clark of the same place, my lawful attorney, for me in my name to state and settle all unsettled accounts between myself and any other person or persons, for me and in my name to pay any and all just debts against me, taking therefor the proper vouchers and receipts; for me and in my name to collect and receive any and all debts due or to become due to me from any other person or persons; for me and in my name to commence and prosecute suits at law or equity for the collection of any debt or debts due or to become due me; and for me and in my name to sell any and all my personal property, chattels real, or choses in action, to such person or persons, and for such sum or sums as he may see fit; and for me and in my name to sell, incumber, or mortgage any lands and real estate now owned by me in the County of Rock aforesaid; and for me and in my name to make, execute, and deliver upon such sales, incumbering or mortgaging, the said land or real estate to the purchaser, incumbrancee, or mortgagee, any paper writing under seal, conveying for myself and my heirs the said lands and real estate, for such sum or sums, and to such person or persons forever (with or without full covenants of warrantee), as my said attorney may see fit; and for me and in my name to make, execute, and deliver any paper writing under seal, incumbrancing or mortgaging any of the said lands and real estate, for such sum or sums, and to such person or persons as my said attorney may see fit; hereby ratifying and confirming all the acts of

the said Henry O. Clark as my attorney, and declaring his said acts in the premises to have the same legal effect as if done by myself.

In testimony whereof, I have hereunto set my hand and seal this twenty-second day of April, in the year of our Lord one thousand eight hundred and fifty-four.

A. HYATT SMITH. [L. S.]

Signed, sealed, and delivered
in presence of
J. WOODLE,
CHARLES D. SELDING.

That he, this defendant, had no other power of attorney from said A. Hyatt Smith whatever. This defendant further says, that the said assignment was made without the knowledge of said Smith and against his wishes.

And this defendant, further answering, says, that there was not at the date of the said assignment, nor had there been prior to that time, any such corporation, body politic, or institution, as the Janesville City Bank. But that this defendant is informed and believes, that on the 3d day of July, 1854, and for some months prior thereto, said Henry B. Benester had been doing business as a broker and banker at the City of Janesville, under the name of the Janesville City Bank. That whatever sums of money were due from the firm of H. O. Clark & Co. to the said Janesville City Bank, were in fact due to said Henry B. Benester.

And this defendant, further answering, says, that he cannot state upon his own knowledge, but that he is informed and believes, that immediately upon the execution of the said indenture of assignment as above stated, this deponent went through with the formality of putting said Charles Stevens in possession of the store in which was situate all and every description of the personal property and choses in action mentioned in said indenture of assignment.

And that he is also informed and believes, that said Charles Stevens did then and there take as assignee, full and absolute possession and control of said store, and all the personal property and choses in action mentioned in said assignment, which included all and singular the goods, wares, merchandise, and chattels, bills, bonds, notes, securities, evidences of debts, books of account, moneys, credits, effects, and all property and assets of the said copartnership, of whatever name or nature, and wheresoever the same were that belonged to said firm. That there was between two and three thousand dollars worth of the stock in trade of said firm at the village of Beloit, at the time of making said assignment, which were not taken possession of by said Stevens, on the 3d day of July, 1854, but that they were taken possession of by him in three or four days thereafter.

This defendant further says, that A. Hyatt Smith, to the know-

ledge of this defendant, never delivered possession to said Stevens of any of the property or choses in action mentioned in said assignment, either in person or by attorney.

The said property consisted of a stock of clothing and cloths, cassimeres, vestings, stocks, cravats, thread, buttons, and gentlemen's furnishing goods, and notes and accounts. That the value of the whole stock of said firm, aside from notes and accounts, was about nine thousand dollars; and that this defendant is unable to state the value of notes and accounts.

That this defendant is not aware that any of the property or assets of said firm was ever withheld from said Stevens and not delivered.

And this defendant, further answering, says, that the said Charles Stevens remained in possession of said store, and had and held the possession of the property mentioned in said assignment, as assignee, selling and disposing of the said wares, goods, and merchandise, and property, and collecting debts and demands due said firm, until the 17th day of August, or thereabouts, when they were taken by the defendant, Henry B. Benester, who entered the store where the said goods were, took possession of them under and by virtue of a chattel-mortgage, which had been given to him upon the stock in trade of the said firm of H. O. Clark & Co., on or about the 19th day of May, A.D. 1854, and removed them to the store of A. W. Wheelock, which chattel-mortgage, and the debt and purposes for which it was given, are hereinafter more fully stated and set forth; that in taking possession of said goods, and removing the same, he was assisted by Charles J. Hayes, Lafayette Patten, James G. Alden, George Richards, and two or three draymen, whose names this defendant does not remember. In consequence whereof, the said Charles Stevens was prevented from further proceeding in the execution of the said assignment by a sale of the property, without first replevying the same.

This defendant says, that he did not assist said Benester in taking possession of and removing said goods, wares, merchandise, or stock in trade, or any part thereof, with the exception of the safe; that A. Hyatt Smith did not assist said Benester in taking possession of and removing said goods, or any part thereof.

This defendant, further answering, says, that on or about the nineteenth day of May, A.D. 1854, the said Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, made, executed, and delivered to the said Henry B. Benester, a mortgage upon "all the stock of goods, consisting of clothing, dry goods, cloths, linens, buttons, boots, shoes, hats, caps, fire-safe fixtures, clocks, mirrors, sewing machines, thread, buttons, needles, handkerchiefs, shirts, collars, one sorrel horse, one sorrel mare, and all other goods and chattels whatsoever there remaining and being in the store then occupied, and the upper stories thereof, by the said mortgagors, in the City of Janesville; which

mortgage was given upon the condition that if the said mortgagors should and did well and truly pay or cause to be paid to the said Benester, his executors, administrators, or assigns, the sum of sixteen thousand dollars, with interest at 12 per cent., on the sixteenth day of November, 1854, then the said mortgage, and everything therein contained, was to cease and be null and void. That the said mortgage purported to be given for money lent. That said mortgage was executed on the 19th day of May, 1854, but was not delivered until the 20th day of May, 1854, and was duly filed in the office of the clerk of the City of Janesville, on or about the 20th day of May, 1854, where it remained of record at the time of filing this answer.

This defendant, further answering, says, that said firm of H. O. Clark & Co., on said 19th day of May, 1854, were indebted to the said Henry B. Benester in the sum of four thousand three hundred and forty-four dollars and forty-eight cents, for money which had, before that time, been lent or advanced to the said firm by the said Benester.

That this defendant, on the said 19th day of May, A.D. 1854, being desirous of obtaining more money of the said Benester, for the purpose of paying the debts of said firm, and to enable the said firm to conduct its business more successfully, applied to the said Benester in behalf of his said firm, for a loan of more money. That said Benester agreed with the said firm to loan them a sufficient amount to make, with said indebtedness above mentioned, as due said Benester, the sum of sixteen thousand dollars, and to take a chattel-mortgage upon the stock in trade of said firm, as security for the payment of the said sum of sixteen thousand dollars, payable on the 16th day of November then next, with interest at the rate of 12 per cent.

That on the said 19th day of May, 1854, in pursuance of said agreement, the said firm of H. O. Clark & Co. did execute a chattel-mortgage upon the stock in trade, consisting of the property above set forth, and conditioned for the payment of said sum of sixteen thousand dollars, on the 16th day of November, A. D. 1854, with interest at 12 per cent.; that the said mortgage was delivered to said Benester by said firm, on the 20th day of May, A.D. 1854; that said Benester, on said 20th day of May, 1854, as part of the consideration of said mortgage, by his acceptance agreed to take up a note given by said firm of H. O. Clark & Co. to the Badger State Bank, and then in the Badger State Bank, of the City of Janesville. That said Benester did subsequently, to wit, on the 18th day of July, A. D. 1854, pay his said acceptance, given for the purpose aforesaid, and that the amount so paid by said Benester on his said acceptance, was two thousand seven hundred and fifty dollars and thirty cents ($2750 30). That for the balance of the said sum of sixteen thousand dollars, to wit, eight thousand nine hundred and five and 20-100 dollars, the said Benester, on said 20th day of May,

1854, gave to said firm his due-bill, payable on demand, at the said Janesville City Bank.

This defendant further says, that from time to time after the giving of said due-bill, and prior to the said assignment, the said Benester had advanced to the said firm the sum of three thousand one hundred and forty-one dollars and forty-six cents.

That, after the said assignment to Charles Stevens was executed, as above stated, the said Benester informed this defendant that he did not wish to make any further advances upon his said due-bills, and requested this defendant to surrender the same to him, and let the said chattel-mortgage stand as security for the amount of the demands of said Benester against the said firm of H. O. Clark & Co.

That this defendant did, on or about the tenth day of July, 1854, surrender to said Benester his said due-bill.

This defendant further says, that from time to time after the making of the said chattel-mortgage, the said firm of H. O. Clark & Co., by this defendant, made several payments, to apply on said mortgage, amounting to the sum of nine hundred and seventy dollars and eight cents ($970 08); and that on the 17th day of August, A. D. 1854, the said firm of H. O. Clark & Co. were owing the said Henry B. Benester, upon the said chattel-mortgage, the sum of nine thousand two hundred and forty-six dollars and thirty cents ($9246 30).

This defendant further says, that said chattel-mortgage contained a clause authorizing said Benester, in case he should deem himself insecure, to take possession of the mortgaged property before the 16th day of November, 1854.

This defendant admits, that the said chattel-mortgage was given by said firm of H. O. Clark & Co. when they were in embarrassed circumstances, and at a time when one and only —— suits were pending against them; that said mortgage was given in the utmost good faith, and not for the purpose of creating an apparent incumbrance, upon said mortgaged property, and covering up the same, to deter creditors from levying upon the same, or to hinder or defraud their creditors, or to enable the said H. O. Clark & Co. to sell and dispose of the same for their own use and benefit, as alleged in said bill of complaint.

And this defendant further says, that at the time of making the said mortgage to said Benester, the said firm of H. O. Clark & Co. had a small stock of goods in the village of Beloit, in Rock County, which were not included in said chattel-mortgage. But this defendant further says, that after said mortgage was executed, a large portion of the stock of goods included therein were taken from the stock in Janesville, and placed among the goods in the store in Beloit; that at the time of making the said assignment, about two-thirds of the stock at Beloit, as this defendant verily believes, were those which had been removed from Janesville as aforesaid, and were

covered by said Benester's chattel-mortgage; and before Benester took possession of the stock of said firm and removed them, he requested said Stevens to separate the stock of goods which had been brought from Beloit, that were not included in his said mortgage, from those that were, but that said Stevens said it was impossible for him to do it.

And this defendant, further answering, says, that on or about the sixth day of June, A. D. 1854, the said firm of H. O. Clark & Co. did make a bona fide sale of all their goods, wares, and merchandise, kept by them for sale in their mercantile business, including the stock at Beloit, to the defendant, Ezra Miller, for the sum of —— dollars, to be paid as follows ——, and the remainder was to be paid as follows ——.

This defendant says, that the sale to said Miller was not made with a view to prevent the creditors of H. O. Clark & Co., who were about to obtain judgment against them, from levying upon the said goods, wares, and merchandise; but said sale was made in good faith, and not with a view to defraud the creditors of said firm, or to hinder or delay them.

That at the time of said sale it was agreed by said firm of H. O. Clark & Co., that the chattel-mortgage upon said stock of goods, held by said Benester, should be taken off by the said firm within three weeks after said sale; that this defendant expected, at the time of said sale, that his said firm would be able to take said chattel-mortgage off from said goods, by giving said Benester other security for his said demand; that his said firm were unable to give said Benester such other security, and the chattel-mortgage remained a lien upon said stock, in consequence of which it was agreed between said firm of H. O. Clark & Co. and said Ezra Miller, that said Miller should relinquish his said purchase; and he accordingly did relinquish the same on the third day of July, 1854, before the said indenture of assignment was made.

That when said Miller did so relinquish his said purchase, he fully accounted for all sales made by him, and paid over all moneys in his hands, and surrendered up all accounts of sales made upon credit, first deducting the expenses of carrying on said business, for the time he had conducted and carried on the same.

This defendant further says, that said Benester was informed of the said sale to said Ezra Miller; that he permitted and suffered the said Miller to carry on the business for the period of about one month without foreclosing his said mortgage; but this defendant says, that during the said time, or most of said time, that Miller was carrying on said business, the said firm of H. O. Clark & Co. were endeavoring to make an arrangement with said Benester to give him other security for his demands, and take up said chattel-mortgage.

This defendant, further answering, says, that said Stevens, after the execution of said assignment as above set forth, did take posses-

sion of the goods mentioned in said assignment, and that he removed the said goods from Beloit to Janesville, as mentioned in said bill of complaint.

That said goods, brought from Beloit, were taken by Benester, as above stated, and for the reason above stated.

This defendant further says, that, at the time said Benester took said goods upon his said mortgage, the said firm of H. O. Clark & Co. transferred to him the stock brought from Beloit, and not included in said mortgage, as collateral security for his demand against said firm; and that said firm did, at the same time, transfer to said Benester, as collateral security for his said demand, all the choses in action, notes, bills, bonds, books of account, and evidences of debt, belonging to said firm of H. O. Clark & Co.

And this defendant admits, that the said Stevens has been prevented from further executing the said assignment since the 17th day of August, 1854, unless he first obtained possession of said goods by replevin.

This defendant further says, that he has been informed and believes, that Stevens offered to bring replevin for the goods taken by said Benester, if he could be indemnified against personal liability by any person or persons claiming an interest in said assignment; and that he offered to bring any other suit or suits, if he was so indemnified, that he should be requested or desired to bring by those claiming an interest in said indenture of assignment.

This defendant further says, that he is informed and believes, that said Stevens has not refused or neglected to execute the said alleged trusts otherwise than as above stated; and this defendant is informed and believes, that said Stevens entered upon the discharge of his duties, as assignee, in the utmost good faith, and did everything that a faithful discharge of his trust required of him, until said goods were taken by said Benester.

This defendant, further answering, says, that he has not the means of ascertaining the amount of the debts, belonging to his said firm, that are alleged to be assigned; or what amount are secured by notes, bills, bonds, or other written promise, except from said Benester, but he verily believes, that the schedule, marked "A.," annexed to said Benester's answer, is correct.

This defendant further says, that he is informed and believes, that said Benester is worth fifty thousand dollars over and above all debts and liabilities against him, and over and above property exempt from attachment and execution by the laws of this State.

This defendant, further answering, says, that A. Hyatt Smith, this defendant, Ira Justin, Jr., and Henry B. Benester, did not, shortly before the taking and demanding said goods and other property, or at any time, consult and conspire together for the purpose of interrupting said Charles Stevens in the prosecution of his business in said store, formerly occupied by said firm, and preventing him from making sale of said property, and taking all and every part

thereof from his possession; that it was not agreed by and between them, at any time, that said Benester should make use of said chattel-mortgage, for the purpose of taking said property from the possession of said Stevens, and placing it in the possession of said H. O. Clark & Co., and thereby defeat the right of the complainants or other creditors of said firm; that they never consulted or conspired together for any such purpose.

This defendant further says, that when the said assignment was made, said Benester was in New York City; that he returned on or about the 10th day of July, A. D. 1854; that, on his return, he was made acquainted with the fact of the making of said indenture of assignment; that said Benester, as this defendant is informed and believes, threatened to take immediate possession of said goods, upon his chattel-mortgage, and sell them at auction; that this defendant went to him and requested him not to take that course, telling him, if he did so, the stock would be sold at a great sacrifice; also stating to him, that he was sure of his pay under said assignment; that it was at this defendant's request and through his solicitation, that said Benester deferred taking said stock as long as he did. This defendant further says, that, at the time he made these requests of said Benester, he did not understand the provisions of said assignment, nor did said Benester.

This defendant further says, that he verily believes that said Benester took possession of all and singular the said property included in his said mortgage, in the utmost good faith, for the sole purpose of securing his said demand against the said firm; that he, said Benester, received the transfer of the stock not included in his said mortgage, and the choses in action, bills, notes, bonds, accounts, books of account, and other evidence of debt, as above stated, for the sole and only purpose of securing his said debt.

This defendant further says, that he utterly denies combining and confederating with the said defendants, or any of them, or any other persons, to injure or aggrieve or oppress the said complainants, or any knowledge of any other of the said defendants combining and confederating for any such purpose.

This defendant further says, that he has given out that the said indenture of assignment, mentioned in said bill of complaint, is entirely null and void, and knows that some of the other defendants have given out the same opinion. This defendant admits, that he has said that he, and the said Ira Justin, had no power or authority to make any such assignment; and that he assigned as a reason for his opinion, that said assignment was made against the wishes and without the knowledge of said Smith; and was also made by said Clark when he was incapacitated, by reason of drunkenness, to transact business, and that the assignment is not such a one as he, this defendant, expected to make.

This defendant further says, that he denies ever admitting or giv-

ing out that he had the power to make such an assignment as the one mentioned in said bill of complaint, and he utterly denies that he ever intended or expected to make such an assignment.

This defendant admits that he has said that all the acts of said Stevens, under said assignment, are void, and that the said firm of H. O. Clark & Co. were not bound in any manner by said assignment.

This defendant, further answering, says, that said Smith was not a silent or dormant partner with this defendant and said Justin, or with this defendant, but was an open and avowed partner, and was so known to be by said complainants. This defendant admits, that for the greater portion of the time during the continuance of said partnership, said Smith was absent from the State, and that this defendant had the chief management and control of the said copartnership business.

This defendant utterly denies that all the terms, conditions, and details of said assignment were arranged by this defendant and Justin, under the advice of their attorneys, some days before making the same.

This defendant admits that he talked with his attorneys about making an assignment, but never agreed or intended to make such a one as the one above set forth.

This defendant further says, that the demand for which the said chattel-mortgage was given to said Benester, was a demand against said firm of H. O. Clark & Co., for money advanced and to be advanced to said firm, and not for the individual indebtedness of said A. Hyatt Smith.

This defendant further says, that he does not know that said Smith and Benester ever accounted together concerning the said sums of money secured by said chattel-mortgage; that he does not know and does not believe that said Smith ever gave said Benester his individual promise, secured by mortgage upon real estate, or in any other way.

This defendant further says, that in the month of June, 1854, said Smith returned to Janesville from Washington, where had been staying temporarily, and this defendant being anxious to have said Benester's chattel-mortgage taken off the said stock in trade of his said firm, and said Benester being also desirous of raising the amount of his demand, secured by said chattel-mortgage, the said defendant, Smith, made two certain mortgages to said Henry B. Benester, amounting in all to ten thousand dollars, and placed them in the hands of the said Benester to be sold by him at par, with the understanding that if said Benester did sell the same, that he might apply a sufficient sum of the proceeds to pay his demand, secured by said chattel-mortgage.

That this defendant is informed and believes, that said Benester

was unable to dispose of the said real estate mortgages, or any of them, and returned them to the said A. Hyatt Smith.

And this defendant denies all unlawful combination and confederacy or fraud charged against him in said bill, without that, that any other matter or thing material or necessary for this defendant to make answer unto; is not, herein or hereby, well and sufficiently answered unto, confessed or avoided, traversed or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed, with his reasonable costs and charges in that behalf most wrongfully sustained.

H. O. CLARK.

JOHN R. BENNETT,
Solr. and Counsel for Defts.

State of Wisconsin, Rock County, *ss.*

Henry O. Clark, the above-named defendant, appeared before me, on the of March, 1855, and by me being first duly sworn, did depose and say, that he had heard read the foregoing answer, by him subscribed, and knows the contents thereof; that the same is true, of his own knowledge, except those matters that are therein stated to be on his information and belief, and as to those matters, he believes it to be true.

GEORGE S. DODGE,
U. S. Commissioner and Master in Chancery.

Further Answer of H. O. Clark.

In the District Court of the United States for the District of Wisconsin.

HENRY C. BOWEN et al., Complts.,
v.
HENRY O. CLARK et al., Defts.

The further answer of H. O. Clark, one of the defendants in this suit, to the bill of complaint of the complainants.

This defendant, saving and reserving to himself the same benefit of exception to the said bill of complaint, as by his former answer to such bill is saved and reserved, for further answer thereto as to the matter of the third exception taken to his former answer, saith: that the schedule hereto annexed, marked "A.," contains a statement of the several kinds, qualities, and descriptions of the goods, wares, and merchandise taken from the possession of the said Charles Stevens, in the manner and for the reason stated in this defendant's former answer to the said bill of complaint, and the said schedule also contains the value thereof specifically.

And this defendant, in further answer to the said bill of complaint,

as to the matters to the fourth exception to his former answer saith, that this defendant is unable to state and set forth more definitely than in his former answer, the amount of the debts and demands taken from the possession of the said Charles Stevens. That the account books, accounts, and choses in action of the firm of H. O. Clark & Co., were transferred to the said Henry B. Benester, as stated in the said former answer of this defendant, since which time they have not been in the possession of this defendant or under his control. But according to the best knowledge, information, and belief of this defendant, schedule "A.," annexed to the answer of the said Benester on file in this cause, contains a full statement of the accounts and notes taken from the store and possession of said Charles Stevens. That this deponent does not know of any other debts or demands which were taken from said store, or from the possession of said Stevens. He does not know that any note, bill, bond, or other evidence in writing, or written promise, was given to secure such debts and demands, than those mentioned in the said schedule, "A."

This defendant does not know the date of any of the said notes, or the amount due or to become upon the same. Nor the date of any of said accounts, or the amount due or to become due upon the same. Nor can this defendant state the names of the makers, drawers, or indorsers thereof more definitely or fully than appears in said schedule, or the rate of interest which they or either of them respectively bear, or from what time the same began to run.

And this defendant, in further answer to the said bill of complaint, as to the matter of the fifth exception to his former answer, saith, that the said schedule "A.," annexed to the answer of the said Benester, according to the best knowledge, information, and belief of this defendant, states and sets out the name of each person or firm against whom any account was outstanding, at the time of making the said alleged assignment to said Charles Stevens. But this defendant does not know, and cannot state the amount owing by each or any of the said persons or firms, or the date or commencement of said accounts or any of them, or whether the same are upon interest.

This defendant cannot state definitely the kinds of property for which said accounts accrued, but he believes that nearly all accrued for goods, wares, and merchandise sold by the firm of H. O. Clark & Co., and is not aware that any of them accrued for any other purpose.

But this defendant is unable to state the particular goods separately, which were the consideration of the said accounts and notes.

And this defendant, in further answer to the said bill of complaint, as to the matters to the sixth exception to his former answer, saith, that he is informed and believes, that on or about the first day of October, A.D. 1855, the said Henry B. Benester took the stock of

was unable to dispose of the said real estate mortgages, or any of them, and returned them to the said A. Hyatt Smith.

And this defendant denies all unlawful combination and confederacy or fraud charged against him in said bill, without that, that any other matter or thing material or necessary for this defendant to make answer unto; is not, herein or hereby, well and sufficiently answered unto, confessed or avoided, traversed or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed, with his reasonable costs and charges in that behalf most wrongfully sustained.

H. O. CLARK.

JOHN R. BENNETT,
Solr. and Counsel for Defts.

State of Wisconsin, Rock County, *ss.*

Henry O. Clark, the above-named defendant, appeared before me, on the of March, 1855, and by me being first duly sworn, did depose and say, that he had heard read the foregoing answer, by him subscribed, and knows the contents thereof; that the same is true, of his own knowledge, except those matters that are therein stated to be on his information and belief, and as to those matters, he believes it to be true.

GEORGE S. DODGE,
U. S. Commissioner and Master in Chancery.

Further Answer of H. O. Clark.

In the District Court of the United States for the District of Wisconsin.

HENRY C. BOWEN et al., Complts.,
v.
HENRY O. CLARK et al., Defts.

The further answer of H. O. Clark, one of the defendants in this suit, to the bill of complaint of the complainants.

This defendant, saving and reserving to himself the same benefit of exception to the said bill of complaint, as by his former answer to such bill is saved and reserved, for further answer thereto as to the matter of the third exception taken to his former answer, saith: that the schedule hereto annexed, marked "A.," contains a statement of the several kinds, qualities, and descriptions of the goods, wares, and merchandise taken from the possession of the said Charles Stevens, in the manner and for the reason stated in this defendant's former answer to the said bill of complaint, and the said schedule also contains the value thereof specifically.

And this defendant, in further answer to the said bill of complaint,

as to the matters to the fourth exception to his former answer saith, that this defendant is unable to state and set forth more definitely than in his former answer, the amount of the debts and demands taken from the possession of the said Charles Stevens. That the account books, accounts, and choses in action of the firm of H. O. Clark & Co., were transferred to the said Henry B. Benester, as stated in the said former answer of this defendant, since which time they have not been in the possession of this defendant or under his control. But according to the best knowledge, information, and belief of this defendant, schedule "A.," annexed to the answer of the said Benester on file in this cause, contains a full statement of the accounts and notes taken from the store and possession of said Charles Stevens. That this deponent does not know of any other debts or demands which were taken from said store, or from the possession of said Stevens. He does not know that any note, bill, bond, or other evidence in writing, or written promise, was given to secure such debts and demands, than those mentioned in the said schedule, "A."

This defendant does not know the date of any of the said notes, or the amount due or to become upon the same. Nor the date of any of said accounts, or the amount due or to become due upon the same. Nor can this defendant state the names of the makers, drawers, or indorsers thereof more definitely or fully than appears in said schedule, or the rate of interest which they or either of them respectively bear, or from what time the same began to run.

And this defendant, in further answer to the said bill of complaint, as to the matter of the fifth exception to his former answer, saith, that the said schedule "A.," annexed to the answer of the said Benester, according to the best knowledge, information, and belief of this defendant, states and sets out the name of each person or firm against whom any account was outstanding, at the time of making the said alleged assignment to said Charles Stevens. But this defendant does not know, and cannot state the amount owing by each or any of the said persons or firms, or the date or commencement of said accounts or any of them, or whether the same are upon interest.

This defendant cannot state definitely the kinds of property for which said accounts accrued, but he believes that nearly all accrued for goods, wares, and merchandise sold by the firm of H. O. Clark & Co., and is not aware that any of them accrued for any other purpose.

But this defendant is unable to state the particular goods separately, which were the consideration of the said accounts and notes.

And this defendant, in further answer to the said bill of complaint, as to the matters to the sixth exception to his former answer, saith, that he is informed and believes, that on or about the first day of October, A.D. 1855, the said Henry B. Benester took the stock of

goods, wares, and merchandise, which had taken upon his chattel-mortgage, and place them in the store, formerly occupied by H. O. Clark & Co., and by his clerks commenced selling them at retail, for the purpose realizing the amount due him upon the said chattel-mortgage given him by the said firm of H. O. Clark & Co., and continued thus selling until on or about the 10th day of March, A.D. 1855; and that during this period, the said Benester had realized from said sales between $3400 and $3500; and that on or about the 10th day of March, A.D. 1855, the balance of the said stock remaining unsold was $2654, at their cost price, which were greatly depreciated in value, as this deponent is informed and believes.

And the said Benester sold them to Charles J. Hayes & Co. for the sum of $1611 93, or at about 60 per cent. of their cost price; that out of this price said Benester paid his clerk, who had been selling said goods, the sum of $235 32, the amount his due, leaving $1376 41 to apply upon Benester's debt against the said firm of H. O. Clark & Co.

This defendant further says, that he is informed believes that the said Benester has collected upon the notes and accounts in his possession, the that were transferred to him, the sum of about two hundred dollars.

All which matters and things this defendant is ready to aver, prove, and maintain, as this honorable Court shall direct, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

H. O. CLARK.

October 9th, 1855.

JOHN R. BENNETT,
Solicitor for Clark.

District of Wisconsin, *ss.*

On this 12th day of November, A.D. 1855, personally appeared before the undersigned, Henry O. Clark, and being by me duly sworn, made oath, that he had heard read the further answer to the said bill of complaint, by him above subscribed, and knew the contents thereof, and that the same is true of his own knowledge, except the matters therein stated upon his information and belief, and as to those matters he believes it to be true.

B. K. MILLER,
Clerk and Commissioner.

Answer of Ira Justin, Jr.

In the District Court of the United States, for the District of Wisconsin. In Equity.

The answer of Ira Justin, Jr., one of the defendants to the bill of complaint of Henry C. Bowen, Theodore McNamee, Samuel P.

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Holmes, and Henry L. Stone, and Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, complainants.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception, which can or may be had or taken to the many errors and uncertainties and other imperfections in said complainants' said bill of complaint, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith, that said Henry O. Clark, A. Hyatt Smith, and this defendant, were not, on the third day of July, one thousand eight hundred and fifty-four, copartners in trade, doing business at Janesville, in the State of Wisconsin, under the name, style, and firm, of H. O. Clark & Co. That they never had been in fact copartners in trade, doing business under said name, style, and firm, or under any other name, style, or firm, at Janesville, or at any other place. But this defendant avers, that said Henry O. Clark and A. Hyatt Smith were, on the said third day of July, A.D. 1854, copartners in trade, doing business at Janesville, Wisconsin, under the name, style, and firm of H. O. Clark & Co., and had been such copartners, doing business as aforesaid, for the term of eighteen months, or thereabouts, prior to that time. That they were engaged in a ready-made clothing and furnishing business. That the defendant was, at the commencement of said business as aforesaid, engaged with the said Clark and Smith as clerk, upon the following terms, viz.: defendant was at his option to have one-fifth of the net profits, accruing to said firm in their said business, or the sum of five hundred dollars, board, lodging, and washing, per year, for his services, but was not to sustain any part or share of the losses of said firm, nor be liable for its debts. And that this deponent had, prior to said third day of July, A.D. 1854, elected to take said sum of five hundred dollars, board, lodging, and washing, per year, for his services.

And this defendant, further answering, says, that he is informed and believes, and therefore admits, that said firm of H. O. Clark & Co. did become indebted to divers and sundry persons in a large amount, and that they did become indebted to the said firm of Bowen & McNamee, as well as to the said firm of Sackett, Belcher & Co. That on said third day of July the said firm of H. O. Clark & Co. were indebted to the said firm of Bowen & McNamee in the sum of seven thousand nine hundred and fifty dollars or thereabouts, but of that sum there was then only due two thousand dollars. That the residue became due as follows: about one thousand dollars on the 30th July, 1854, about one thousand dollars on the 30th day of August, A.D. 1854. Two thousand dollars or thereabouts, on the 30th day of October, A.D. 1854, and the remainder on the 30th day of December, 1854. That on the said third day of July, the said

firm of H. O. Clark & Co. were indebted to Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, in the sum of about one thousand eight hundred and thirty-four dollars. That the said indebtedness to said firm of Bowen and McNamee, prior to said third day of July, was evidenced by the promissory notes of said firm of H. O. Clark & Co. But on that day a judgment by confession was entered for said indebtedness, in the Circuit Court for Rock County, which judgment has been set aside and vacated as to said A. Hyatt Smith, for the reason that he did not execute or authorize the execution of said warrant of attorney on which said judgment was entered.

That said demands of said firm of Sackett, Belcher & Co., on said third day of July, was evidenced by the books of account of the said respective firms, and also by the acceptance, by H. O. Clark & Co., of a draft drawn on them by Sackett, Belcher & Co., for the amount of their said demand.

That the defendant does not know the precise amount of the indebtedness of said firm of H. O. Clark & Co., aside from complainants' demands, but believes it to be near forty thousand dollars.

This defendant, further answering, says, that he is informed and believes, that on the third day of July, 1854, the said Henry O. Clark executed for himself a written assignment, a copy of which is set forth in said Clark's answer in this cause, and that he also executed the same for and in behalf of said A. Hyatt Smith, but without power or authority from said Smith so to do, and that said Clark was intoxicated at the time that he executed the said assignment for himself and for said Smith; that this defendant, at the request of Clark, also executed the said assignment, but that said Clark was intoxicated at the time he made such request of this defendant; that this defendant is advised and believes, that said assignment is inoperative and void so far as the said Clark and Smith are concerned, because of said want of authority and of said intoxication on the part of said Clark as aforesaid; that this defendant had no title or pecuniary interest in or to the property of said firm of H. O. Clark & Co., and supposed that his execution of said assignment was required as a matter of form, and not for any other purpose.

This defendant, further answering, says, that he is informed and believes that said Clark did some acts in relation to delivering possession of the property and effects of said firm of H. O. Clark & Co. to said Charles Stevens, but that said Clark was so much intoxicated at the time as to render his acts in relation to delivering possession of said property and effects inoperative and void.

This defendant admits that said Stevens took possession, on or about said third day of July, of all the property and effects of said firm of H. O. Clark & Co.; that the value of the whole stock of goods and personal property of said firm, aside from debts, demands, and choses in action, was about nine thousand dollars; defendant is not

informed, and cannot state the value of the debts, demands, accounts, and choses in action due said firm of H. O. Clark & Co.

This defendant further says, that he is informed and believes that said Charles Stevens remained in possession of the property and effects of said firm of H. O. Clark & Co. until the 17th day of August, 1854, or thereabouts, when the same were taken by said defendant, Henry B. Benester, who entered the store where the said property and effects were, and took possession of the same on and by virtue of a chattel-mortgage, which had been given to him upon the stock in trade of said firm of H. O. Clark & Co.; that said mortgage was executed by said Henry O. Clark and by the said A. Hyatt Smith, by the said Henry O. Clark, as his attorney, and by this defendant at said Clark's request; that said Benester removed said property and effects to the store of the said defendant, A. W. Wheelock; that this defendant was employed by the said Benester to assist in removing said property and effects, and did assist him in removing the same.

This defendant further says, that he is informed and believes that said chattel-mortgage, executed as aforesaid, was a good and valid lien upon said goods and property; that the same was given in good faith for a good and sufficient consideration, and that at the time of taking said property and effects as aforesaid, there was due and unpaid upon said chattel-mortgage the sum of nine thousand two hundred and forty-six dollars and thirty cents, or thereabouts, and that said property and effects were lawfully and rightfully taken by said Benester on said mortgage.

This defendant, in further answering, says, that said firm of H. O. Clark & Co. had a stock of goods at Beloit, in the County of Rock, at the time said chattel-mortgage was given as aforesaid, which were not included in the property thereby mortgaged.

That after said chattel-mortgage was executed, and prior to said third day of July, a large amount of goods were taken from said stock at Janesville, which were included in said chattel-mortgage, to Beloit, and placed with the said goods at Beloit; that he is informed and believes that said Stevens took possession of said stock of goods at Beloit under said pretended and removed the same to Janesville, and placed them among and intermixed them with said goods at Janesville; that this defendant does not know and cannot state precisely what amount of goods were so removed from Beloit by said Stevens, nor the precise portion thereof that were included in said mortgage; but this defendant believes that at least two-thirds of said goods so removed from Beloit to Janesville by said Stevens, were included in and covered by said chattel-mortgage.

That at the time said Benester took said goods and property on his said chattel-mortgage, as aforesaid, he requested the said Charles Stevens to select the said goods so removed from Beloit, and not included in his said mortgage, and separate them from said goods and

property that were included therein; that said Stevens informed said Benester that said goods were so intermixed, that it was impossible to separate them; said Benester then requested this defendant to make such separation, but this defendant was unable so to do, and so informed said Benester.

This defendant, in further answering, denies all combination and confederacy with the other defendants, or any or either of them, or any other person or persons, to injure, oppress, or defraud the said complainants; and also denies that, shortly prior to the taking and removing said property and effects of said firm by said Benester, as aforesaid, or that at any other time, the said Henry O. Clark, A. Hyatt Smith, Henry B. Benester, or any of them, did conspire together for the purpose stated in said bill of complaint, or for any other purpose.

This defendant, in further answering, says, he has not sufficient knowledge or information, in relation to the other matters or things charged in said complainants' bill of complaint, to enable him to state the facts in relation thereto, and therefore denies the same, and leaves the said complainants to their proofs, in relation thereto, as they shall be advised.

This defendant, therefore, asks to be hence dismissed, with his proper costs and charges decreed to him.

IRA JUSTIN, JR.

JOHN R. BENNETT,
Sol'r. for Defendant.
S. A. HUDSON,
Of Counsel.

District Court of the United States, for the District of Wisconsin, *ss.*

Ira Justin, Jr., the above-named defendant, appeared before, on this 2d day of April, 1855, and by me being first duly sworn, did depose and say, that he had heard read the foregoing answer, by him subscribed, and knows the contents thereof; that the same is true of his own knowledge, except those matters that are therein stated to be upon his information and belief, and as to those matters, he believes it to be true.

GEORGE S. DODGE,
U. S. Commissioner and
Master in Chancery.

Answer of A. Hyatt Smith.

In the District Court of the United States, for the District of Wisconsin.

HENRY C. BOWEN et al.
v.
HENRY O. CLARK et al.

The answer of A. Hyatt Smith, one of the defendants in the above-

entitled cause, to the bill of complaint of Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone; and Amos Sackett, William Belcher, Henry Belcher, and Ralph Sackett, complainants.

This defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties, and imperfections in the said complainants' said bill of complaint contained, for answer thereto, or to so much, or such part thereof, as this defendant is advised is or may be material or necessary for him to make answer unto, this defendant, answering, says, that he denies that Henry O. Clark, Ira Justin, Jr., and this defendant, as between themselves, were partners in trade, doing business under the name of H. O. Clark & Co., at Janesville, in the State of Wisconsin, on the 3d day of July, A. D. 1854, or that they ever were such partners.

But this defendant admits, that he and Henry O. Clark were at that time partners in trade, doing business at Janesville, Wisconsin, under the name of H. O. Clark & Co.; that they had been doing business as partners, at Janesville aforesaid, under the said name, for about the term of one year and six months; that when this defendant and the said Henry O. Clark first commenced doing business under the said name, as partners, Ira Justin, Jr., was employed by them as clerk, upon the following terms: said Justin furnished no capital, but was to work for this defendant and said Clark, in their said partnership business, for one-fifth of the net profits of said business, or, at his, said Justin's, election, was to have a salary of five hundred dollars a year, besides his board, lodging, and washing.

That the said Ira Justin, Jr., had, prior to the said third day of July, A. D. 1854, made his election to take said salary of five hundred dollars, and his board, lodging, and washing.

But this defendant admits, that, as to the said complainants, the said Ira Justin, Jr., may be considered partner with this defendant and said Clark, from this manner in which he held himself out to said complainants.

The business in which this defendant and the said Clark were engaged, was the clothing business, and keeping a general gentlemen's furnishing store.

This defendant, further answering, says, that he admits that this said firm of H. O. Clark & Co. did become indebted to divers and sundry persons, to a large amount, and particularly to the said complainants; and that the said firm did, on the said third day of July, A. D. 1854, owe the said firm of Bowen & McNamee the sum of seven thousand nine hundred and fifty dollars or thereabouts.

And that the said firm of H. O. Clark & Co. did, at the same time, owe the said firm of Sackett, Belcher & Co. the sum of about two

thousand dollars, as this defendant is informed and verily believes. But this defendant further says, that he is informed and verily believes, that only a small portion of the said demand of the said firm of Bowen & McNamee was due on said third day of July, A. D. 1854, not more than about two thousand dollars, and that the balance became due as follows: one thousand dollars on the 30th of July, 1854; one thousand on the 3d of August, 1854; two thousand and sixteen dollars, October 30th, 1854; and the remainder on the 30th day of December, 1854, and was evidenced by the notes of the said firm of H. O. Clark & Co., prior to July 3d, 1854.

That the said demand of Sackett, Belcher & Co. was evidenced by books of account, and the acceptance by H. O. Clark & Co. of a draft of said firm, for the amount of their demand.

That on the said third day of July, 1854, as this defendant is informed and believes, the said Henry O. Clark and Ira Justin, Jr., gave the said firm of Bowen & McNamee, a judgment by confession, in the Circuit Court for the County of Rock, State of Wisconsin, for the full amount of the said demand of said firm of Bowen & McNamee, against said firm of H. O. Clark & Co., which judgment was, by its terms, not only a judgment against the said Henry O. Clark and Ira Justin, Jr., but also against the defendant.

But this defendant expressly denies that said Henry O. Clark and Ira Justin, Jr., or either of them, or any other person, had any power or authority to enter said judgment by confession, or in any other way, against this defendant. But this defendant admits that the said Ira Justin, Jr., and the said Henry O. Clark had the power to confess judgment against themselves. This defendant further says, that at the last November Term of the said Circuit Court for Rock County, he applied to the said Circuit Court for an order setting aside and vacating the said judgment, as against this defendant, which order was granted, and the said judgment vacated, as to this defendant, at the said November Term, A. D. 1854, by the said Circuit Court. But the judgment still remains in full force and effect against the said Clark and Justin. And this defendant says, that the demand of the said firm of Bowen & McNamee was and is merged in the said judgment, and that he, this defendant, is fully and completely discharged from the debt of said Bowen & McNamee, and that he is not liable to pay the same.

This defendant, further answering, says, that he denies that the said firm of H. O. Clark & Co. did, on the third day of July, A. D. 1854, or any other time, make an assignment of all their goods, wares, and merchandise, bills, bonds, notes, credits, and effects, and all their property and assets, of every name and nature, to Charles Stevens, for the benefit of creditors. This defendant further says, that he is informed and believes, that the said Henry O. Clark and Ira Justin, Jr., did, on the third day of July, A. D. 1854, make, execute, and deliver to said Charles Stevens, a certain indenture of as-

signment, a copy of which is hereto annexed and marked "A.;" that the said assignment was executed by the said Henry O. Clark and Ira Justin, Jr., in person, defendant is informed and believes. But this defendant is also informed and believes, that at the time the said H. O. Clark executed the said assignment, he, the said Clark, was wholly incompetent for doing any business, by reason of his being intoxicated by the use of intoxicating or spirituous liquors or drinks; which intoxication, this defendant is informed and believes, was mainly brought about through the agency of one Anthony Gilkison, a runner of the said firm of Bowen & McNamee, for the procuring the said Clark and Justin to make such assignment while said Clark was intoxicated, well knowing that he would not have made the same while sober. This defendant further says, that he is informed and believes, that the said Ira Justin, Jr., executed said assignment at the request of said Clark, without knowing the particular provision or effect of the same.

This defendant further says, that he is informed by the said Clark, and verily believes, that a day or two prior to the making of the said assignment by said Clark and Justin, the said Clark had been repeatedly urged by the said Anthony Gilkison to make an assignment, and that said Clark had partially consented to make one; but that the one the said Clark had so consented to make, was to be one in which the creditors who are preferred in said assignment, marked "A.," were to be preferred and paid in the following order, viz.: Ezra Miller, of Wisconsin, was first to be paid the full amount of his claim, Mrs. Almira Clark was next to be paid the full amount of her demand, the Janesville City Bank, Henry B. Benester, was next to be paid the full amount due unto him, and so on to Bowen & McNamee, who were to be the last class of preferred creditors.

This defendant further says, that he is informed by the said Clark and believes, that the said Clark never intended to make such an assignment as the one above set forth and marked "A.," and that when he, the said Clark, did make the same, he did not know or understand the provisions or effect thereof until about ten days after the same was made, when he learned them from the said defendant, Henry B. Benester.

And this defendant denies that he ever executed the said assignment, marked "A.," either in person or by an attorney duly authorized for that purpose, or in any way, manner, or by any other means. And this defendant denies that he ever authorized the said Clark, or any other person, to execute the said assignment, marked "A.," for him, this defendant. And this defendant expressly denies that the said Henry O. Clark was duly authorized and empowered to make said assignment, marked "A.," by a power of attorney, made, executed, and delivered to the said Clark by the defendant. This defendant says, that he admits that on or about the 22d day of April, A. D. 1854, he, the defendant, made and executed, under his hand

and seal, a certain power of attorney, a copy of which is hereto annexed, and marked "B.," which said power of attorney was duly acknowledged by this defendant, and delivered to the said Clark; that he never gave the said Clark any other power of attorney than the one above-mentioned. That said power of attorney above-mentioned was given to said Clark, to enable him to transact the private business of this defendant, and not for the purpose of giving to said Clark any power or authority over the property and effects of the said firm of H. O. Clark & Co.

And this defendant explicitly denies that the said power of attorney was given by this defendant to said Clark for the purpose of authorizing said Clark to make any assignment of the partnership property, of the said firm of H. O. Clark & Co., and avers that it confers upon the said Clark no such power.

This defendant further says, that, prior to the execution of the said assignment by the said Clark and Justin, and, as near as this defendant can recollect, on or about the 10th day of June, A. D. 1854, this defendant had a conversation with the said Anthony Gilkison, the said agent or runner of the said of Bowen & McNamee, in the presence and hearing of the said Henry O. Clark, relative to the demand of said firm of Bowen & McNamee against the said firm of H. O. Clark & Co., in which the said Anthony Gilkison urged this defendant and the said Clark, to give the said firm of Bowen & McNamee a preference over the other creditors of said firm of H. O. Clark & Co., by a confession of judgment for their whole claim, or otherwise, stating as a reason why he thought his said firm was entitled to said preference, that his said firm had been of great assistance to said Clark in enabling him to make purchases for H. O. Clark & Co. of traders in New York; that this defendant repeatedly refused to consent to said Gilkison's proposition, repeatedly stating within, that, whatever might be the personal relations between the said Henry O. Clark and the said firm of Bowen & McNamee, he, this defendant, had no part in them, could not recognize them, or any other creditors, for goods sold as a confidential creditor, to be preferred before other creditors; and that this defendant desired the assets and property of this said firm to be distributed, pro rata, amongst the creditors thereof, and that he would not consent to give one creditor, or set of creditors, a preference over the others; and this defendant avers and states, that, from the time of this conversation until the making of the said assignment on the third day of July, 1854, no material change had taken place in the affairs or situation of the said firm of H. O. Clark & Co.; that no new debts had been contracted, and that their debts and liabilities remained the same, as this defendant is informed and verily believes; and that no exigency had arisen to make such an assignment more necessary than it had been at the time of the said conversation.

And this defendant further states, that the said assignment was made without his knowledge or consent, and contrary to his wishes

as expressed to said Clark; that this defendant did not know of the execution of the said assignment, until nearly a month after it was executed; and that, as soon as he learned that such an assignment had been made, he immediately expressed his dissent to the same, and that he never, in any way or manner, ratified or assented to the same.

This defendant further says, that he is informed and believes that, immediately after the execution and delivery of the said assignment, and on the same day, the said Charles Stevens took full possession of the store in which his said firm had been doing their business in the City of Janesville, together with all and singular the goods, wares, merchandise, and chattels, bills, bonds, notes, securities, evidences of debts, books of account, moneys, credits, effects, and all property and assets of the said copartnership, of whatever name or nature and wherever the same were, which belonged to said firm or copartnership; and that this defendant is not aware that any of the property or assets of said firm was withheld from said Stevens. But this defendant denies, that the said firm of H. O. Clark & Co. delivered any of the property or effects, notes, bonds, evidences of debt, books of account, moneys, credits, and the said store, to the said Charles Stevens, immediately after or at any time after the making and delivering the said assignment. But this defendant admits, that he is informed and believes, that, immediately after the execution and delivery of the said assignment to Charles Stevens, by the said Clark and Justin, as above stated, the said Henry O. Clark, while in his said state of intoxication, did deliver to the said Stevens the possession of the said store, together with all the property mentioned in the said assignment, which said delivery, this defendant is informed and believes, was acquiesced in by the said Ira Justin, Jr. But this defendant denies, that the said delivery of the said H. O. Clark and Ira Justin, Jr., was the act of said firm of H. O. Clark & Co., and that his said firm was and is not bound by the same, and that said Stevens was a trespasser in taking possession of the said store and partnership-property, and that all his acts, as assignee, under said assignment, are without authority and void.

And this defendant, further answering, says, that he is informed and believes that the said Charles Stevens did have and hold the possession of the said property and assets of his said firm under said assignment, and that he, the said Charles Stevens, did enter upon the execution of said trusts in and by said terms in said deed of assignment created and reposed, according to the true intent and meaning of the terms of said assignment, and in the utmost good faith.

This defendant, further answering, says, that of his own knowledge he cannot state, but that he is informed and believes that the said Charles Stevens remained in his said possession of the said store, and had and held the property mentioned in said assignment, as assignee, under the same, selling and disposing of the said goods, wares,

and merchandise and property, and collecting such debts, dues, and demands, as by the terms of said assignment he was directed to do, and as he had covenanted and agreed to do, up to about the 17th day of August, A. D. 1854. This defendant further says, that on or about the 17th day of August, the said Henry B. Benester entered the said store, and where the said goods, wares, and merchandise, and other property, credits, and effects were, and which were then in the possession of Charles Stevens, as above stated and set forth, and took possession of all and singular the said goods, wares, merchandise, and forbid the said Stevens to make any other or further disposition of the said property, except as hereinafter stated.

That this defendant further says, that said Benester took possession of the said goods, wares, and merchandise, upon and by virtue of a chattel-mortgage, duly executed to him by the said H. O. Clark & Co., bearing date the 19th day of May, A.D. 1854, to secure the payment of the sum of sixteen thousand dollars, on or before the 16th day of November, A.D. 1854, which mortgage, and the consideration upon which the same was given, is more fully hereinafter stated and set forth. But the defendant explicitly denies that he assisted the said Henry B. Benester in taking possession of the said goods, wares, and property so taken by him, or any part thereof. This defendant further says, that he is informed and believes that said Benester, in taking possession thereof, as above stated, was assisted by Ira Justin, Jr., Charles J. Hayes, George Richards, but not Charles Richards, and James G. Alden, a constable, residing in the City of Janesville.

This defendant further says, that he is informed and believes that Lafayette Patten, who is an attorney and counsellor at law, acted as the legal adviser of the said Henry B. Benester, when he took said property upon his said chattel-mortgage. This defendant further says, that he is informed and believes that the said Benester did not take possession of the said property for the purpose of hindering and preventing the said Stevens from executing the trusts created by the terms of the said assignment, but for the purpose of securing and collecting his debt against the firm of H. O. Clark & Co., secured by the said chattel-mortgage. This defendant further says, that he is informed and verily believes, that at the time said Benester took possession and removed said goods, wares, and merchandise, the said firm of H. O. Clark & Co. transferred to the said Benester, a small stock of goods in store, not covered by said Benester's mortgage, as collateral security for his said mortgage, which small stock of goods had been intermingled by the said Charles Stevens with the goods included in said mortgage. But this defendant is informed and believes that when said Benester took the goods upon his said mortgage, he requested said Stevens to separate the goods not included in the same from those that were, and the said Stevens said that it was impossible for him to do so, whereupon the said Benester took

said stock not included in his mortgage, and the same was subsequently transferred to him by the said firm of H. O. Clark & Co., as above stated, and said firm did at the same time transfer to said Benester, as collateral security for his said demand against said firm, all the notes, bonds, accounts, evidences of debt, and account books of his said firm.

But this defendant denies that said transfer of said stock, not covered by said Benester's mortgage, and the notes, and accounts, evidences of debt, bonds, and books of accounts of said firm, was made with the intention of preventing said Stevens from executing the said assignment, but says, it was made for the purpose of securing the debt of said Benester against his said firm.

This defendant further says, that when the said Benester removed said property from said store, he took the same to the store of Asabel W. Wheelock, where it remained until about the 1st day of October, A.D. 1854, when the said Benester placed the same in the said store from which he took the same, and commenced selling the same, for the purpose of paying his debts against said firm. And this defendant is further informed and believes, that said Benester continued to sell goods until about the 10th day of March, A.D. 1855, when he sold what remained of them to Charles J. Hayes & Co., for the sum of one thousand three hundred and seventy-six dollars and forty-one cents ($1376 41).

This defendant further says, that he is informed and verily believes that from the said 1st day of October, A.D. 1854, till the said 10th day of March, A.D. 1855, the said Benester had realized from sales made of said goods, between three thousand four hundred and three thousand and five hundred dollars.

And that on the said 10th day of March, A.D. 1855, there remained of said stock of goods the sum of two thousand six hundred and $\frac{54}{100}$ dollars, at their cost price. That the said remaining stock, being refuse goods and greatly depreciated in value, the said Benester sold them to said Charles J. Hayes & Co., for the sum of sixteen hundred and eleven and $\frac{93}{100}$ dollars, or at sixty per cent. on the dollar of their cost price. That at the time of said cost sale there was due from said Benester to his clerk, who had been selling said goods, the sum of two hundred thirty-five and $\frac{52}{100}$ dollars ($235 52), which left above sum of ($1376 41), to apply on said Benester's debt against said firm of H. O. Clark & Co., which, with the sum of $3400 or $3500, before realized by the said Benester from said sales, makes between ($4776 41) and ($4876 41), to apply upon the said debt of said Benester, against said firm of H. O. Clark & Co.

This defendant further says, that he is informed and believes, that said Benester has collected upon the notes and accounts of the said firm, which were transferred to him, the sum of about two hundred dollars ($200).

This defendant, further answering, says, that he does not know,

and has not the means of ascertaining the value of the goods, wares, and merchandise, and property, which was taken by the said Benester upon his said chattel-mortgage. But he is informed and believes, that not far from the time of making the said assignment, the said stock of goods were inventoried by Ensign H. Bennett and Henry L. Shelton, two competent men, chosen and selected by Charles Stevens for that purpose, at the sum of about $7000, and that after said inventory was made, an additional stock of goods, which had belonged to said firm of H. O. Clark & Co., of the value of about two thousand dollars, which were at Beloit, in Rock County, at the time of making said assignment, were brought by Charles Stevens and placed in said store, with the said $7000 worth of goods.

This defendant further says, that he is informed and believes that the said Charles Stevens, during the time he was selling said goods, realized from the sales he made between three and four thousand dollars.

This defendant further says, that he does not know and cannot state the value of the bills, bonds, notes, and accounts of said firm of H. O. Clark & Co., which were transferred to the said Benester.

This defendant, further answering, says, that he is informed and verily believes, that on or about the nineteenth day of May, one thousand eight hundred and fifty-four, the said Clark and Justin and this defendant, by Henry O. Clark, his attorney, made, executed, and delivered to the said Henry B. Benester, a chattel-mortgage, upon certain personal property belonging to the said firm of H. O. Clark & Co., which is described in said mortgage substantially as follows: "All the stock of goods, consisting of clothing, dry goods, cloths, linens, cottons, boots, shoes, hats, caps, fire-safe, fixtures, clocks, mirrors, sewing machine, thread, buttons, needles, handkerchiefs, shirts, collars, one sorrel mare, one sorrel horse, and all other goods and chattels whatever, now remaining and being in the store at present occupied, and the upper stories thereof, by the said party of the first part, in the City of Janesville," which mortgage was upon the condition mentioned in the bill of complaint of the said complainant, and was filed in the office of the city clerk, of the City of Janesville, as in said bill stated. The said mortgage contained a provision, authorizing the said Benester to take possession at any time before the sixteenth day of November, 1854, if he should deem himself insecure.

This defendant further says, that he was not in the City of Janesville at the time the said mortgage was made and delivered to the said Benester. But he is informed and believes that the said firm of H. O. Clark & Co. did not, on the said 19th day of June, before the making of said mortgage, owe the said Benester the sum of sixteen thousand dollars. And he is further informed and believes, that on the 19th day of May, A.D. 1854, the said firm of H. O. Clark & Co. were indebted to the said Henry B. Benester in the sum of

($4344 48) four thousand three hundred and forty-four dollars and forty-eight cents, for money which had before that time been lent and advanced to the said firm by the said Benester.

This defendant is further informed and believes, that on the said 19th day of May, 1854, the said Henry O. Clark, for the purpose of raising money to pay debts against the said firm, and to enable it to conduct its business more successfully, applied to said Benester for an additional loan; that said Benester then agreed to loan the said firm a sum sufficient to make $16,000 with the debt he then held against the said firm, to wit, $11,655 52, and to take a chattel-mortgage upon the stock in trade of said firm, as security for said loan, payable on the 16th day of November then next, with 12 per cent. interest.

This defendant further says, that he is informed and believes, that the said Benester did, as a part of the consideration of the said mortgage, that is, the additional sum to be advanced by him to said firm, did on the said 19th day of May, agree to pay a note given by said firm to the Badger State Bank, which he did subsequently pay, amounting to the sum of ($2750 30) two thousand seven hundred and fifty and 30-100 dollars, and that said Benester gave his due-bill, payable on demand to the said firm, for the balance, to wit, for the sum of ($8904 22), upon which due-bill this defendant is informed and believes that said Benester had advanced the sum of ($3141 46) three thousand one hundred forty-one and 46-100 dollars, prior to said third day of July, A.D. 1854. This defendant further says, that he is informed and believes, that after the said assignment was made to the said Charles Stevens, the said Benester declined to make any further advances upon the said due-bill, and requested that it might be surrendered, and that said mortgage stand as security for the amount then due said Benester, which was accordingly done. This defendant further says, that he is informed and believes, that after the said mortgage was given, and prior to the said 17th day of August, A.D. 1854, his said firm had paid said Benester, to apply on said mortgage, the sum of ($970 08) nine hundred and seventy and 8-100 dollars. And that on the 17th day of August, 1854, there was due the said Benester, from said firm of H. O. Clark & Co., the sum of about nine thousand two hundred and fifty-six dollars.

This defendant further says, that said mortgage was given by said firm when they were in embarrassed circumstances, when there was one suit pending against them and only one. This defendant further says, that he is informed that the same was given in good faith, with no intention of creating an apparent incumbrance upon the and covering up the same, to deter creditors from levying upon the same, and to hinder and defraud their creditors, and enable the said H. O. Clark & Co. to sell and dispose of the same for their own use and benefit. This defendant further says, that he is informed and believes, that at the time of the execution of the said mortgage, there was a small

stock of goods at Beloit not covered by said mortgage. But this defendant says, that he is informed and believes, that two-thirds of the said stock of two thousand dollars, which were subsequently removed from Beloit to Janesville by said Stevens, were included in said chattel-mortgage, and were removed from Janesville to Beloit after said mortgage was made.

This defendant, further answering, says, that of his own knowledge he cannot state, but that he is informed and believes, that the said firm of H. O. Clark & Co., on or about the first day of June, A.D. 1854, by H. O. Clark, made a sale of all their goods, wares, and merchandise, kept by them for sale in their mercantile business, including the goods at Beloit, to the said defendant, Ezra Miller. That this defendant was not in the State of Wisconsin when the sale to Miller was made, and does not know the particular consideration upon which the same was made, or the particular terms and conditions of the sale.

But he is informed and believes that one of the conditions of said sale was, that said firm were to have the said stock of goods released from the chattel-mortgage held by said Benester, on or before the 22d day of June, A.D. 1854.

This defendant further says, that said firm failed to have the said stock of goods released from said mortgage, and that the said Miller in consequence thereof surrendered to said firm his said purchase, on or about the third day of July, A.D. 1854, fully accounting to them for all sales made by him, after deducting the current expenses of carrying on said business, as stated in said bill of complaint.

This defendant further says, that he is informed and believes that said Benester permitted said Miller to make sales of said goods so purchased by him, without any interference with him. But he is also informed and believes, that said Benester's mortgage was recorded in the office of the clerk of the City of Janesville, which was sufficient evidence of Benester's interest in said goods, and rendered it entirely unnecessary for him to make or prefer any additional claims thereto.

This defendant further says, that he is also informed and believes, that one reason why said Benester permitted said Miller to sell said goods without foreclosing his said mortgage was, that said Benester was informed that his said mortgage was to be paid within a short time after said sale to said Miller, by the said firm of H. O. Clark & Co.

This defendant further says, that he is informed and believes that the sale to Miller was made in good faith, and not with a view to prevent the creditors of the said firm of H. O. Clark & Co., who were then about to obtain judgment, from levying upon the said goods, wares, and merchandise.

This defendant further says, that the said Charles Stevens was not prevented from executing the said assignment by said Benester

taking the said goods; but he avers that said Charles Stevens, had he desired so to do, could have taken said goods back into his possession by replevying the same; and this defendant is informed and believes that said Stevens offered to bring replevin or trespass, or any other action he should be requested to bring, by those interested in the execution of said assignment, providing they would first indemnify him against all personal liabilities in so doing.

And this defendant is informed and believes, that those interested in the execution of the said assignment, refused so to indemnify the said Charles Stevens.

But this defendant denies, that any trusts were created by the said assignment, or that any other creditors of the said firm of H. O. Clark & Co. acquired any interest in the stock in trade of said firm, under or by virtue of the said assignment, and submits to this honorable court that the said pretended assignment, and all and singular the provisions thereof, are void.

This defendant, further answering, says, that this defendant and the said Benester, Clark, and Justin did not, shortly before the taking and removing of the said goods by the said Benester, conspire together for the purpose of interrupting the said Charles Stevens in the prosecution of his business in said store, and preventing him from making sale of said property, and of taking all and every part thereof from his possession.

This defendant, further says, that it was never agreed between them thus conspiring, that said Benester should make use of said chattel-mortgage for the purpose of taking the said property from the possession of the said Charles Stevens, and placing it in the possession of said H. O. Clark & Co., and thereby wholly defeat the rights of the said complainants, and the other creditors of the said firm of H. O. Clark & Co., in and to the said assigned property.

This defendant, answering, says, that he denies that any part of the demand of the said Henry B. Benester against the said firm of H. O. Clark & Co., was for money which had been advanced to or for the sole or exclusive benefit of this defendant; but he avers that the full amount of the said Benester's demand against said firm was for money that he had advanced to the said firm for said firm's benefit.

And this defendant denies, that since the giving of the said chattel-mortgage, or long before the 17th day of August, A.D. 1854, or at any other time, this defendant and the said Henry B. Benester accounted together concerning the said sums of money, or any money advanced by said Benester to said firm. And this defendant denies, that he assumed the payment of any moneys lent and advanced by said Benester to said firm of H. O. Clark & Co., or gave his individual promise to pay the same.

This defendant admits, that between the third and twelfth days of June, A.D. 1854, the said Benester being desirous to raise the

amount due him from the said firm of H. O. Clark & Co., and the said firm being also desirous of paying the said chattel-mortgage, and releasing the goods covered thereby, from said incumbrance, this defendant did, at the request of said Clark and Benester, agree to place and did accordingly place in the hands of said Benester certain mortgages upon real estate, with authority to the said Benester to negotiate and sell the same for their face, and apply the avails thereof in payment of said chattel-mortgage. But this defendant expressly denies, that said mortgages were received by said Benester as pay of his demand against said firm.

And this defendant says, that he was subsequently informed by the said Benester, and believes that said Benester was unable to negotiate or sell the said mortgages, or any of them, and handed them back to this defendant.

This defendant admits, that he has given out and stated in relation to the matters of the complainants' said bill of complaint, the facts hereinbefore stated, and denies that he has given out, or stated otherwise or differently, relative to the said matters.

And this defendant denies all unlawful confirmation and confederacy or fraud charged against him in said bill, without that, that any other matter or thing material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready to maintain, aver, and prove, as this honorable court shall direct, and prays to be hence dismissed with his costs and charges in that behalf most wrongfully sustained.

A. HYATT SMITH.

JOHN R. BENNETT,
Sol'r. and Counsel for De'ft.

State of Wisconsin, Rock County, *ss.*

A. Hyatt Smith, the above defendant, appeared before me, this 2d day of April, A. D. 1855, and being by me first duly sworn, did depose and say, that he had read the foregoing answer, by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated to be upon his information and belief, and as to those matters he believes it to be true.

GEO. S. DODGE,
U. S. Commissioner and
Master in Chancery.

This indenture, made and entered into at Janesville, Wisconsin, this third day of July, A. D. 1854, by and between Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, under the name, style, and firm of H. O. Clark & Co., party of the first part, and

Charles Stevens, of said Janesville, party of the second part, witnesseth.

Whereas, the said copartnership, party of the first part, is justly indebted in sundry great sums of money, and has become unable to pay and discharge the same with punctuality, and the said party of the first part are desirous of making a fair and equitable distribution of their property and effects among their creditors.

Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and one dollar to them in hand paid this day, by the said party of the second part, the receipt whereof is hereby acknowledged, have given, granted, sold, transferred, assigned, and set over, and by these presents do hereby give, grant, sell, transfer, assign, and set over to the said party of the second part, and to his assigns and vendee or vendees, forever, all this stock in trade of the said party of the first part, now in the store heretofore occupied by the party of the first part, in the City of Janesville, in Wisconsin, and more recently occupied by Ezra Miller as a clothing store. The said stock consists of clothing, and cloths, and merchandise; and also all notes, bills, bonds, mortgages, debts, choses in action and effects of the said copartnership, party of the first part, of whatever kind, nature, or description, together with all books, vouchers, memoranda, and written evidences of said indebtedness; and do give, grant, and assign, and set over to the party of the second part, all the property, moneys, and effects, and stock in trade, of the said copartnership, party of the first part, of whatever kind or description, and wherever the same may be, together with all the property, effects, credits, and assets of the said copartnership, party of the first part, be the same more or less.

All of said property and effects, so given, granted, sold, assigned, transferred, and set over, as aforesaid, are given, granted, assigned, transferred, and set over, as aforesaid, to the said party of the second part, in trust and to and for the following express uses, intents, and purposes: that is to say, that the said party of the second shall take immediate possession of all the property and effects so hereinbefore sold, given, granted, assigned, transferred, and set over, as aforesaid, and immediately sell and convert the same into cash; and also in the shortest possible time collect all and singular the debts, dues, demands, bills, bonds, notes, accounts, claims, and choses in action, so assigned, sold, given, granted, and set over, as aforesaid, or so much thereof as can be collected, and thereupon to make and execute all necessary instruments for that purpose, and by and with the proceeds of said property, converted into cash as aforesaid, and the moneys collected as aforesaid, the said party of the second part shall pay all just and reasonable expenses and charges of executing and carrying into effect this assignment, and by and with the residue or net proceeds of such sales and collections, the said party of the second part shall—

First. Pay and discharge in full the several and respective debts, bonds, notes, judgments, and sums of money due, or to grow due, from the said party of the first part, of whatever kind, or for which the party of the first part is legally liable, to Sidney Corbett, of New York, Ezra Miller, of Wisconsin, Sackett, Belcher & Co., of New York, Mrs. Almira Clark, of Wisconsin, Bowen & McNamee, of New York, the Janesville City Bank, H. B. Benester, together with all interest due or to grow due thereon; and if said process and avails shall not be sufficient to pay the whole debts due, as aforesaid, to said persons above first named, as creditors of the party of the first part, these said proceeds and avails shall be distributed pro rata among them all, in proportion to the amount of their respective claims.

Secondly. By and with the residue and remainder of the said proceeds, if there shall be any, the party of the second part shall pay all the other copartnership debts, demands, and liabilities, due or to become due, from the party of the first part; and if said remainder is insufficient to pay all of said debts, then he shall pay them pro rata, share and share alike, according to their respective amounts.

Thirdly. If after these before-mentioned payments made by the party of the second part, there shall be any remainder of said proceeds, then he, the said party of the second part, shall pay all the individual indebtedness, from the members of the copartnership, party of the first part; and if such remainder is insufficient to pay all, then such payment to such individual creditors shall be made pro rata, share and share alike.

And for the better execution of these presents, and the several trusts thereby reposed, the said parties of the first part do hereby make and constitute the said party of the second part, his executors, administrators, and assigns, their, and each of their true and lawful attorney irrevocable, with full power and authority to do and perform all the acts in their name necessary to the full execution and performance of the trusts herein and hereby reposed.

In witness whereof, the parties of the first part have hereunto set their hands and seals, at Janesville, in Wisconsin, this 3d day of July, A. D. 1854.

H. O. CLARK, [SEAL.]
IRA JUSTIN, JR., [SEAL.]
A. HYATT SMITH, [SEAL.]
By H. O. CLARK,
His partner.
H. O. CLARK & CO.,
CHARLES STEVENS, [SEAL.]

In presence of
MAT. H. CARPENTER,
CHAS. S. JORDAN,
A. GILKISON.

Know all men by these presents, that I, A. Hyatt Smith, of the City of Janesville, in the County of Rock, and State of Wisconsin, do hereby nominate, constitute, and appoint Henry O. Clark, of the same place, my lawful attorney, for me and in my name to state and settle all unsettled accounts between myself and any other person or persons; for me and in my name to pay any and all just debts against me, taking therefor the proper vouchers and receipts; for me and in my name to collect and receive any and all debts due, or to become due, to me, from any other person or persons; for me and in my name to commence and prosecute suits at law or equity, for the collection of any debt or debts due or to become due; and for me and in my name to sell any and all my personal property, chattels real, or choses in action, to such person or persons, or for such sum or sums, as he may see fit; and for me and in my name to sell, incumber, or mortgage any lands and real estate now owned by me in the County of Rock aforesaid; and for me and in my name to make, execute, and deliver, upon such sales, incumbering or mortgaging the said land or real estate, to the purchase, incumbrance, or mortgage, any paper-writing under seal, conveying for myself and my heirs the said lands and real estate, for such sum or sums, and to such person or persons forever (with or without full covenants for warrantee), as my said attorney may see fit; and for me and in my name to make, execute, and deliver, any paper-writing, under seal, incumbrancing or mortgaging any of the said lands and real estate, for such sum or sums and to such person or persons as my said attorney may see fit; hereby ratifying and confirming all the acts of the said Henry O. Clark, as my attorney, and declaring his said acts in the premises to have the same legal effect as if done by myself.

In testimony whereof, I have hereunto set my hand and seal, this twenty-second day of April, in the year of our Lord one thousand eight hundred and fifty-four.

A. HYATT SMITH, [SEAL.]

Signed, sealed, and delivered
in presence of
J. WOODLE,
CHARLES D. SELDING.

Further Answer of Smith.

District Court of the United States, for the District of Wisconsin.

HENRY C. BOWEN et al., Complainants,
v.
HENRY O. CLARK et al., Defendants,
} In Equity.

The further answer of A. Hyatt Smith, one of the defendants in this suit, to the original bill of complaint of the complainants.

This defendant, saving and reserving to himself the same benefit of exception to the said bill of complaint as by his former answer to such bill is saved and reserved, for answer thereto as to the matters to

the third exception taken to his former answer, saith, that he does not know, and has not the means of knowing, and cannot therefore state, the several kinds, quantities, and description of goods, wares, and merchandise, taken from the said Charles Stevens by the said Henry B. Benester upon his said chattel-mortgage; nor does this defendant know, or have the means of knowing, the value thereof, specifically. But this defendant says, that the goods, wares, merchandise, so taken from said Charles Stevens, mainly consisted of a stock of ready-made clothing, cloths, cassimeres, and a general assortment of gentlemen's furnishing goods, and that the value thereof was between five and six thousand dollars.

This defendant further says, that he does not know, and has not the means of knowing, and cannot therefore state, the amount of the debts and demands, so taken from the store, from the possession of the said Charles Stevens, as stated in said bill of complaint.

That he does not know, and cannot state, whether the said debts and demands, or any of them, are secured by bill, bond, or note, or other evidence in writing, or written promise; or whether the same rests in an account liquidated or unliquidated. He further says, that he cannot set forth the date of any note, bill, bond, or other security; nor does he know the amount due on them, or any of them, or the time when the same or any of them will become due.

This defendant further says, that he does not know, has not the means of knowing, and cannot therefore state, the names of any of the makers, drawers, and indorsers thereof, or the rate of interest that they or any of them draw or are upon, or from what time the same began to run.

This defendant further says, that he does not know the name of any person or firm against whom any account was outstanding at the time of making the said assignment to the said Charles Stevens, its date or commencement, or whether the same is upon interest, or the kind of property for which the same accrued.

This defendant further says, that he cannot state more fully or definitely than in his former answer to said bill, what property had been assigned, sold, or disposed of; nor to whom, nor upon what conditions, or what has been done with the proceeds thereof.

This defendant further says, that he cannot state which of the said debts have been collected, or from whom, or what amount has been collected, from any particular person, or where the said money thus collected is.

All which matters and things this defendant is ready to aver, prove, and maintain, as this honorable Court shall direct, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

November 5th, 1855.

A. HYATT SMITH.

JOHN R. BENNETT,
Solicitor for Smith.

United States of America, District of Wisconsin, *ss.*

On this 10th day of November, A. D. 1855, personally appeared before the undersigned, A. Hyatt Smith, and being by me duly sworn, made oath, that he had heard read the further answer by him, above subscribed, and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief, and that, as to those matters, he believes it to be true.

B. K. MILLER,
Clerk and Comm'r.

Decree.

United States of America, District of Wisconsin, *ss.*

At a special term of the District Court of the United States of America, for the District of Wisconsin, begun and held, according to law, at the City of Milwaukie, in said District of Wisconsin, on the second Monday (being the tenth day) of November, A. D. 1856, present, the honorable Andrew G. Miller, Judge of said Court, presiding.

On the third day of the said term, to wit, on the twelfth day of November, A. D. 1856, the following proceedings were had, to wit:

HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, HENRY L. STONE, AMOS SACKETT, WILLIAM BELCHER, HENRY BELCHER, and RALPH SACKETT,
v.
HENRY O. CLARK, A. HYATT SMITH, IRA JUSTIN, JR., HENRY B. BENESTER, CHARLES STEVENS, ALMIRA CLARK, CHARLES J. HAYS, LA FAYETTE PATTON, JAMES G. ALDEN, CHARLES RICHARDS, ASAHEL W. WHEELOCK, and EZRA MILLER.
} In Equity.

This day came the complainants by their counsel, and on their motion it is ordered and decreed by the Court, that the bill of complaint herein filed be and hereby is dismissed as to the defendants, Charles J. Hayes, La Fayette Patton, James G. Alden, Charles Richards, and Asahel W. Wheelock. And this cause came on to be heard upon this bill, and the several answers of the defendants, Henry O. Clark, A. Hyatt Smith, Ira Justin, Jr., and Henry B. Benester, and the replication thereto, and upon proofs and exhibits, and was argued by Mr. Lynde and Mr. Sleeper for the complainants, and by Mr. Bennett and Mr. Sloan for the said defendants; on consideration whereof it is ordered and decreed by the Court, and this Court doth now here order, adjudge, and decree, that the complain-

ants' said bill of complaint be and hereby is dismissed, as to these last-named several defendants, but without prejudice, and that the said defendants do have and recover of the complainants their costs about their said defence by them in this behalf expended, and in default thereof that an execution be issued against them for the same.

A. G. MILLER.

Original Assignment.

This indenture, made and entered into at Janesville, Wisconsin, this third day of July, A. D. 1854, by and between Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, partners, under the name, style, and firm of H. O. Clark & Co., party of the first part, and Charles Stevens, of said Janesville, party of the second part, witnesseth.

Whereas, the said copartnership, party of the first part, is justly indebted in sundry great sums of money, and has become unable to pay and discharge the same with punctuality and the said party of the first part are desirous of making a fair and equitable distribution of their property and effects among their creditors.

Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises, and one dollar to them in hand paid this day, by the said party of the second part, the receipt whereof is hereby acknowledged, have given, granted, sold, transferred, assigned, and set over, and by these presents do hereby give, grant, sell, transfer, assign, and set over to the said party of the second part, and to his assigns and vendee or vendees forever, all the stock in trade of the said party of the first part, now in the store heretofore occupied by the party of the first part, in the City of Janesville, in Wisconsin, and more recently occupied by Ezra Miller as a clothing store; said stock consists of clothing, and cloths, and merchandise, and also all the notes, bills, bonds, mortgages, debts, choses in action, and effects of the said copartnership, party of the first part, of whatever kind, nature, or description, together with all books, vouchers, memoranda, and written evidences of said indebtedness, and do give, grant, and assign and set over to the party of the second part, all the property, moneys, and effects, and stocks in trade of the said copartnership, party of the first part, of whatever kind or description, and wherever the same may be, together with all the property, effects, credits, and assets of the said copartnership, party of the first part, be the same more or less.

All of said property and effects, so given, granted, sold, assigned, transferred, and set over as aforesaid, are given, granted, assigned, transferred, and set over as aforesaid, to the said party of the second part, in trust, and to and for the following express uses, intents, and purposes; that is to say, that the said party of the second part shall take immediate possession of all the property and effects, so

hereinbefore sold, given, granted, assigned, transferred, and set over as aforesaid, and immediately sell and convert the same into cash; and also, in the shortest possible time, collect all and singular the debts, dues, demands, bills, bonds, notes, accounts, claims, and choses in action, so assigned, sold, given, granted, and set over as aforesaid, or so much thereof as can be collected, and thereupon to make and execute all necessary instruments for that purpose, and by and with the proceeds of said property converted into cash as aforesaid, and the moneys collected as aforesaid, the said party of the second part shall pay all just and reasonable expenses and charges of executing and carrying into effect this assignment; and by and with the residue or net proceeds of such sales and collections, the said party of the second part shall—

First. Pay and discharge in full the several and respective debts, bonds, notes, "judgments," and sums of money due, or to grow due from the said parties of the first part, of whatever kind, or for which the party of the first part are legally liable, to Sidney Corbett, of New York, Ezra Miller, of Wisconsin, Sackett Belcher & Co., of New York, Mrs. Almira Clark, of Wisconsin, Bowen & McNamee, of New York, the Janesville City Bank, H. B. Benester, together with all interest due, or to grow due thereon; and if said proceeds and avails shall not be sufficient to pay the whole debts, due as aforesaid, to said persons above first named as creditors of the party of the first part, then said proceeds and avails shall be distributed pro rata among them all, in proportion to the amount of their respective claims.

Secondly. By and with the residue and remainder of the said proceeds, if there shall be any, the party of the second part shall pay all the other copartnership debts, demands, and liabilities, due or to become due, from the party of the first part; and if said remainder is insufficient to pay all of said debts, then he shall pay them pro rata, share and share alike, according to their respective amounts.

Thirdly. If after these before-mentioned payments, made by the party of the second part, there shall be any remainder of said proceeds, then he, the said party of the second part, shall pay all the individual indebtedness from the members of the copartnership party, of the first part; and if such remainder is insufficient to pay all, then such payment to such individual creditors shall be made pro rata, share and share alike.

And for the better execution of these presents, and the several trusts hereby reposed, the said parties of the first part do hereby make and constitute the said party of the second part, his executors, administrators, and assigns, their and each of their true and lawful attorney irrevocable, with full power and authority to do and perform all the acts in their name necessary to the full execution and performance of the trusts herein and hereby reposed.

In witness whereof, the parties of the first part have hereunto set

their hands and seal at Janesville, in Wisconsin, this third day of July, A.D. 1854.

H. O. CLARK. [SEAL.]
IRA JUSTIN, JR., [SEAL.]
A. HYATT SMITH, [SEAL.]
By H. O. CLARK,
His Partner.
H. O. CLARK & CO.
CHARLES STEVENS. [SEAL.]

In presence of
MAT. H. CARPENTER,
CHAS. S. JORDAN,
A. GILKISON.

Bond.

And afterwards, to wit, on the seventeenth day of July, A.D. 1857, came the said defendants by their said attorneys, and filed their bond as follows:

Supreme Court of the United States.

HENRY O. CLARK, IRA JUSTIN, JR., and A. HYATT SMITH,
v.
HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, and HENRY L. STONE.

Know all men by these presents, that we, Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, as principals, and Alexander T. Gray and Isaac Woodle, as sureties, are held and firmly bound unto Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, in the penal sum of five hundred dollars ($500), to be paid to the said Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the sixteenth day of July, A.D. 1857.

Whereas, the above-named Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the District Court of the United States, for the District of Wisconsin.

Now, therefore, the condition of this obligation is such, that if the above named Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, shall prosecute their said writ of error to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall

be void. Otherwise, the same shall be and remain in full force and virtue.

H. O. CLARK, [SEAL.]
IRA JUSTIN, JR., [SEAL.]
A. HYATT SMITH, [SEAL.]
ALEX. T. GRAY, [SEAL.]
ISAAC WOODLE, [SEAL.]

Sealed and delivered
in presence of
L. F. PATTEN.

State of Wisconsin, Rock County, *ss.*

Alexander T. Gray and Isaac Woodle, sureties to the above bond, being each duly sworn each for himself, says, that he is a freeholder and resident in the State of Wisconsin, and that he is worth the sum of one thousand dollars, over and above all debts which he owes or has incurred, and over and above all his liabilities and exemptions.

ALEX. T. GRAY,
ISAAC WOODLE.

Sworn to before me, this 16th day of July, A.D. 1857.

L. F. PATTEN,
Notary Public, Rock Co., Wis.

(Indorsed.) "July 17, 1857. This bond and sureties approved.

A. G. MILLER,
Judge."

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged, in pursuance of the statute of the United States in such case made and provided, for the above-named Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, defendants in error.

United States of America, District of Wisconsin, *ss.*

I, John M. Miller, clerk of the District Court of the United States of America for the District of Wisconsin, do hereby certify the foregoing to be a full and complete record of the proceedings in the case of Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, against Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Milwaukie, this seventh day of November, in the year of our Lord one thousand eight hundred and fifty-seven, and of our Independence the eighty-second.

[SEAL.]

J. M. MILLER,
Clerk.

United States of America, *ss.*

The President of the United States of America, to the Judge of the District Court of the United States of America, for the District of Wisconsin, greeting:

[SEAL.] Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said District Court of the United States of America, for the District of Wisconsin, before you, between Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, and Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., a manifest error hath happened, to the great damage of the said Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., as by the complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States, should be done.

Witness, the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and of the Independence of the United States the eighty-second.

J. L. HATHAWAY.
Clerk.

Indorsed: Henry O. Clark, A. Hyatt Smith, and Ira Justin, Jr., plaintiffs in error, *v.* Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, defendants in error. Writ of error. Filed, July 17th, 1857.

The United States of America,

To Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the City of Washington, on the first Monday of December next, pursuant to a writ of error, from a judgment of the District Court of the United States of America, for the District of Wisconsin, wherein Henry O. Clark, Ira Justin, Jr., and A. Hyatt Smith, are plain-

tiffs in error, and you are defendants in error, to show cause, if any there be, why the said judgment should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and of our Independence the eighty-second.

A. G. MILLER,
Judge, District Court of the United States, for the District of Wisconsin.

The foregoing citation served, by showing the original and delivering a copy thereof to (B. K. Miller, one of the firm of) Finches, Lynde, Miller, the attorneys of Henry C. Bowen, Theodore McNamee, Samuel P. Holmes, and Henry L. Stone, on the 28th day of July, 1857, at Milwaukie.

W. J. THOMAS,
Marshal.
By D. C. REED,
Deputy Marshal.

Fees service, ...	$2 00
Copy, ...	20
	$2 20

District of Wisconsin, *ss.*

D. C. Reed, being duly sworn, says, that he served this citation as above stated.

D. C. REED.

Subscribed, and sworn to before me, this 1st day of August, 1857.

J. M. MILLER,
U. S. Com'r, Wis.